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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG,
~~Petitioner~~ Appellant

VS

JOAN PAILLOT FEENSTRA,
~~Respondent~~ Appellee

VS

EDWIN W. EDWARDS and STATE
OF LOUISIANA

STATEMENT OF JURISDICTION

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1979

NO. _____

I

KARL J. KIRCHBERG is the petitioner in this matter. He appeals the decision rendered by the United States Court of Appeals for the Fifth Circuit, said decision having been rendered on the date of December 12, 1979. The official caption of the case is entitled:

KARL J. KIRCHBERG,
Petitioner

VS

JOAN PAILLOT FEENSTRA,
Respondent

VS

EDWIN W. EDWARDS and STATE OF
LOUISIANA

No. 77-1991.

United States Court of Appeals,
Fifth Circuit.

December 12, 1979.

The Court of Appeals rendered an original opinion and a corrected opinion. Both of the opinions are identical. The

case is officially reported at 609 F.2d 727. The case originated in the Federal Court System as Karl J. Kirchberg v. Joan Paillot Feenstra, et al, Civil Action No. 76-842 U.S.D.C. E.D. La. (1977) 430 F. Supp 642.

II

Grounds of Jurisdiction

This decision is appealed pursuant to Title 28 U.S.C.A. Section 1254, which states as follows: "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such petitioner, and the review on appeal shall be restricted to the federal questions presented;" The petitioner appeals from a decision rendered on December 12, 1979, and reported as Kirchberg v. Feenstra, 609 F.2d 729 (1979). The jurisprudence eminating from the Supreme Court of the United States of America clearly sustains and affirms the power of this Honorable Court to sustain jurisdiction in this instant litigation. The Fifth Circuit in case No. 77-1991, Kirchberg v. Feenstra, 609 F.2d 727 (1979), held "that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment. . ." at page 730. According to Dutton vs. Evans, Ga. 1970, 91 S. Court 210, 400 U.S. 74, 27 L. Ed. 2d. 213, the respondent had the right to appeal

to the Supreme Court from the Court of Appeals ruling that a particular Georgia statute was unconstitutional. Moreover, City of Detroit v. Murray Corp. of America, Mich. 1958, 78 S. Court 458, 486, 355 U.S. 489, 2 L. Ed. 2d. 441, 460 rehearing denied 78 S. Ct. 1145, 357 U.S. 913, 2. L. Ed. 2d. 1164, upheld appellate review. Finally in Watson v. Employers Liability Assurance Corp., La. 1954, 75 S.Ct. 166, 348 U.S. 66, 99L. Ed. 635, rehearing denied 75 S. Ct. 289, 348, U.S. 921, 99 L. Ed. 722, the Federal Court of Appeals held a Louisiana statute to be unconstitutional and the Supreme Court decided that the litigation was properly lodged before it on appeal.

The following statute of the State of Louisiana was held to be unconstitutional as of the date of December 12, 1979.

ART. 2404. Rights and restrictions of husband as master of community

Art. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratutious and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (As amended by Acts 1926, No. 96).

Editorial Comment

R.S. (:2801-9:2804 (Acts 1921, Ex.Sess., No. 35) provides for a designation and declaration of family home and recordation thereof. Thereafter the husband may not sell or mortgage the family home except with the consent of the wife.

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III

Questions Presented By The Appeal

1) Does Louisiana Civil Code Article 2404 violate the equal protection clause of the Fourteenth Amendment; U.S. Constitution Amendment 14?

2) Did the Court of Appeals only hold that Article 2404 of the La. C.C. is unconstitutional or did the Court in effect overrule major principles of the Civil Law of Louisiana enumerated and expressed throughout the Civil Code?

3) Does the Decision rendered by the Fifth Circuit Court of Appeals apply to Karl J. Kirchberg, thus preventing the Civil Sheriff of Orleans Parish from seizing the Feenstra home, or is the decision prospective only in that the holding does not apply to Kirchberg, and therefore he can proceed to enforce the mortgage and have the Feenstra home seized and sold?

IV

Concise Statement of The Case

This particular litigation originated from an act of mortgage executed in 1974 by Mr. Feenstra as mortgagor and Karl J. Krichberg, as the mortgagee. The mortgage covered the family home, which was a portion of the Community Property owned by the Feestra's. The promissory note was not paid by Mr. Feenstra, and as a result, the Civil Sheriff for the Parish of Orleans, State of Louisiana, by executory process, was directed to seize and to sell the Feenstra home. Mr. Karl J. Kirchberg subsequently filed a petition for declaratory judgment against Mrs. Feenstra. Mrs. Feenstra opposed the foreclosure on the property, contending that Karl J. Kirchberg had violated the Trust in Lending Act, 15 U.S.C. 8;1601, et seq. Thereafter, Karl J. Kirchberg instituted a proceedings in United States District Court for the Eastern District of Louisiana, Karl J. Kirchberg v. Joan Paillot Feenstra, et al Civ. A. No: 76-842, praying for a declaratory judgment that he had not violated the Act. Mrs. Feenstra answered the complaint, and she asserted two counterclaims. In the first counterclaim, she sought rescission of the mortgage for Truth-

In-Lending disclosure violations. In the second counterclaim, she sought a declaration that article 2334 of the Louisiana Civil Code was unconstitutional, because it violated the equal protection and due process clauses of the fourteenth amendment. The second counterclaim was asserted against the Governor of the State of Louisiana and the State of Louisiana, as well as against Karl J. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim. The District Court granted the summary judgment against Mrs. Feenstra and she appealed to the Fifth Circuit Court of Appeals. All parties involved, have dismissed their claims and counterclaims against each other on the Truth-In-Lending issue. Thereafter, the attention of the District Court and the Fifth Cricuit Court of Appeals, was focused upon Article 2404 of the Louisiana Civil Code. This particular Codal provision bestows power upon the husband to alienate and to encumber the effects of the community estate. Mrs. Feenstra appealed to the Fifth Circuit Court of Appeals, praying that Article 2404 be declared unconstitutional as a violation of the equal protection clause of the fourteenth amendment. It was the desire of Mrs. Feenstra that a holding from the Fifth Circuit declaring Article 2404 to be unconstitutional, would subsequently mean that the mortgage executed on the family home by Mr. Feenstra would indeed be invalid: because the power of Mr. Feenstra to encumber the community home was generated by Article 2404 La. C.C. The Court of Appeals did hold the above mentioned article to violate the Federal Constitution. However, the Court has not clearly directed the Lower District Court as the application of its decision. As is

stated in Kirchberg v. Feenstra, 609 F.2d 727 (1979) (p. 735), "We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana." Does this statement mean that Article 2404 is unconstitutional and that the mortgage executed by Mr. Feenstra is void; or does this statement mean that the mortgage is unconstitutional but that this particular mortgage is valid because Mr. Kirchberg relied on Article 2404 of La. C.C. at the time that he executed same, as mortgagee, and therefore a holding of retroactivity would place the financial interests of Mr. Kirchberg in jeopardy?

An additional question arises from this holding from the years of October 22, 1974, the date of the original mortgage, until the date of December 12, 1979, are all mortgages enacted in the State of Louisiana by the husband above invalid? If that were so, a chaotic situation would develop in the commercial trade of Louisiana.

V

Statement Outlining the Substantial Nature of the Controversy.

The issues that confront this Honorable Court are indeed monumental and complex. As Judge Sear has stated, Kirchberg v. Feenstra, 430 F. Supp. 642 (1977) (p. 644), "at stake here is the bedrock of Louisiana's community property system." The Civil Code of the State of Louisiana is indeed a unique system of integrated laws that connect and interlace themselves to form a structural framwork of legal principles.

The declaration that one particular codal provision, is unconstitutional, indeed threatens the entire foundation of this legal system. Indeed, the declaration that Article 2404 La. C.C., violates the fourteenth amendment to the United States Constitution, strikes at the very heart of the community property regime established for the citizens of the State of Louisiana, by the Legislature of said Soverign Entity. If is therefore with great humility and reverence that Karl J. Kirchberg appeals the decision of the Fifth Circuit Court of Appeals, praying that Article 2404 La. C.C. be declared constitutional according to the Fourteenth Amendment of the United States Constitution; or that in the event that said Honorable Tribunal should uphold the decision of the Fifth Circuit Court of Appeals, that said decision be held not to apply to the legal interests of Mr. Feenstra as mortgagor of the property and Karl J. Kirchberg as the mortgagee, and therefore, that Kirchberg be allowed to satisfy his judgment against Mr. Feenstra by an order directing the Civil Sheriff for the Parish of Orleans to seize and sell the Feenstra home.

CERTIFICATE OF SERVICE

I, ALAN FORD SCHOENBERGER, Counsel for Appellant, Karl J. Kirchberg, do affirm that on this 7th day of March, 1980, I have served upon the following named parties by depositing same in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to counsel of record, the attached Notice of Appeal, three copies to each counsel of record.

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Karl J. KIRCHBERG

v.

Joan Paillot FEENSTRA et al.

Civ. A. No. 76-842.

United States District Court,
E. D. Louisiana.

April 21, 1977.

After a husband secured his debt to an attorney for attorney's fees by executing a mortgage on his family home, which was held in the name of both spouses, the attorney instituted foreclosure proceedings in state court and, after the wife opposed the foreclosure, brought an action in federal court for declaratory judgment that he had not violated the Truth in Lending Act. The wife counterclaimed, seeking declaratory judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted the husband to mortgage the home without her knowledge or consent. The District Court, Sear, J., held that denial of equal protection was not shown.

Motion for summary judgment granted.

Constitutional Law ⇐224(2)
Husband and Wife ⇐14.10

Louisiana statutes were not unconstitutional as denying equal protection to extent that they permitted husband to mortgage property held in joint names of both spouses without wife's consent. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.; LSA-C.C. arts. 86, 90, 91, 110, 119, 227, 2325, 2332, 2334, 2404, 2424; U.S.C.A. Const. Amend. 14.

William R. Brough, New Orleans, La., for plaintiff.

Barbara Hausman-Smith, Jack Mark Stolier, George M. Strickler, Jr., New Orleans, La., for defendant.

ORDER

SEAR, District Judge:

A hearing was held on a prior day on the motion of the State of Louisiana for summary judgment on the second counterclaim of Joan P. Feenstra. Following oral argument and the submission of additional memoranda, the matter was taken under submission.

The facts are not in dispute. Defendant and plaintiff in counterclaim, Joan P. Feenstra, filed state criminal charges against her husband Harold C. Feenstra in October, 1974. While incarcerated on that

charge, Feenstra hired Karl J. Kirchberg, attorney at law, plaintiff and defendant in counterclaim, to represent him in connection with the criminal charge. In payment of Kirchberg's legal fees, Feenstra executed a promissory note dated October 17, 1974 for $3,000.00 payable to the order of Kirchberg with interest at the rate of 8% per annum. The note provided for attorney's fees in case payment was not timely made. On October 22, 1974, Feenstra executed an act of mortgage on his family home as security for the promissory note he had issued to Kirchberg. The home was the community property of the Feenstras and title was held in the name of both spouses.

Ms. Feenstra was unaware that her husband had mortgaged their home until February, 1976, when, after default on the mortgage, Kirchberg instituted foreclosure proceedings in state court. Ms. Feenstra opposed the foreclosure, contending that Kirchberg had violated the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* Thereafter, Kirchberg instituted this proceeding for declaratory judgment that he had not violated the Act. Ms. Feenstra counterclaimed and seeks a declaratory judgment (a) that Kirchberg had violated the Act, and (b) that the provision of Louisiana law which permitted Feenstra to mortgage their home without her knowledge or consent violated the Equal Protection and Due Process Clauses of the Fourteenth Amend-

ment. The State of Louisiana was made a third party defendant on Feenstra's second counterclaim. Cross motions on the issues addressed to the Truth in Lending Act were previously denied; we now consider the Fourteenth Amendment question.

The provision of Louisiana law that Ms. Feenstra contests as unconstitutional is Louisiana Civil Code article 2334 which since this suit was filed has been amended and the provision which Ms. Feenstra finds objectionable changed.[1] The amendment, however, did not become effective until January 1, 1977, so it has no effect on this case. Article 2334 before its amendment provided:

> "The property of married persons is divided into separate and common property.
>
> "Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.
>
> "The earnings of the wife when living separate and apart from her husband al-

1. La.Civil Code art. 2334, as amended by La. Acts 1976, No. 679, now provides:

> "Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent."

though not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property.

"Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

"Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.

"Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated."

Ms. Feenstra challenges the last paragraph of the article, which prohibited the husband from leasing, selling, or mortgag-

ing community immovables when the wife had filed the declaration described. She contends that to require the wife to file such a declaration to protect her property interests, when the husband need not, violates the Equal Protection and Due Process Clause of the Fourteenth Amendment.[2]

The Court considered the issues raised by Ms. Feenstra were of a nature that the civilian academicians might want to express their views and accordingly invited the four Louisiana law schools, the Louisiana Law Institute and the Louisiana State Bar Association to file amicus curiae briefs. None accepted the invitation.

Equity would seem to require that the complaint here presented be resolved in favor of the wife whose husband mortgaged her home to raise funds for the defense of criminal charges brought against him by the wife and who then defaulted on the obligation which it secured. But at stake here is the bedrock of Louisiana's community property system.

We believe that Ms. Feenstra's complaint is not so much with the last paragraph of former article 2334, but with the general power which remains unchanged by the 1976 amendment to article 2334 of the husband to administer community property as head and master of the community as described in La.Civil Code art. 2402:

2. Although article 2334 has been challenged on both equal protection and due process grounds, in practical terms these are merely opposite sides of the same issue. It is the alleged denial of due process under article 2334 which gives rise to the equal protection claim. *See e. g., Stanley v. Illinois*, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. We apply, therefore, an equal protection approach to the problem.

"The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and *may alienate them by an onerous title, without the consent and permission of his wife.*" (emphasis supplied)

The power of the husband to alienate was without limitation until 1912 when article 2334 was amended by La.Acts 1912, No. 170 to require the wife's written authority or consent for the husband to sell community property standing in the name of the wife alone. It was not until 1962, that the last paragraph of article 2334 was added [3] to restrict the husband's power to alienate community immovables standing in the names of both spouses. The constitutional attack on the last paragraph of article 2334 is, we believe, somewhat misplaced; if it were not for that paragraph, the husband would have unhindered power to alienate community immovables standing in the names of both the husband and wife. Therefore, we consider that Ms. Feenstra's challenge is to the operation of both articles 2404 and 2334.

Equal protection analysis of alleged sex-based discrimination must necessarily begin with *Reed v. Reed*, 1971, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 which involved a successful equal protection attack on an Idaho statute which preferred males over

3. La.Acts 1962, No. 353. The 1976 amendment to article 2334 restricts the husband's powers even more.

females in the selection of estate administrators when both were of equal entitlement otherwise. In discussing the Equal Protection Clause, the Court stated:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny the power to States to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

404 U.S. at 75–76, 92 S.Ct. at 253–54, 30 L.Ed.2d at 229 (citations omitted).

The Court found that the object of the statute, which was "to eliminate one area of controversy" where two or more persons are equally entitled to be named administrator and thus reduce the workload of the probate court, was a legitimate state interest, but held that statute failed to advance that objective "in a manner consistent with the command of the Equal Protection Clause."

Reed was applied by the Supreme Court two years later in *Frontiero v. Richardson*, 1973, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583. The Court there struck down a federal statute which permitted a serviceman to claim his wife as a dependent for purposes of air force benefits without regard to whether she was actually dependent on him, but required that a servicewoman demonstrate her husband's dependency before claiming the benefits. A four vote plurality concluded that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny". 411 U.S. at 688, 93 S.Ct. at 1771, 36 L.Ed.2d at 592.

A majority of the Supreme Court has never adopted the position that classification based on sex is inherently suspect, and the lower courts have read *Reed* and *Frontiero* as establishing a middle ground: "A classification based upon sex is less that suspect; a validating relationship must be more than minimal. What emerges is an 'intermediate approach' between rational basis and compelling interest." *Eslinger v. Thomas*, 4 Cir. 1973, 476 F.2d 225, 230–31.

Were we dealing with a statute preferring males over females in the selection of estate administrators or one making it easier for males than females to obtain govern-

mental benefits, we would agree that the *Reed-Frontiero* test would require a finding of equal protection denial. In this case, however, we are faced with an entirely different situation, one in which such an analysis would be inappropriate. As discussed above, the last paragraph of article 2334 must be read in conjunction with the head and master provision of article 2404. Together, these articles constitute an integral part of the Louisiana community property system; they define the rights of husband and wife to deal with property owned by the community.

The regulation of property rights, especially between husband and wife, are peculiarly matters of State interest and concern. This was recognized by the United States Supreme Court in *Labine v. Vincent*, 1971, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288, in which the Court rejected an equal protection and due process attack on a Louisiana succession statute which precluded illegitimates, although duly acknowledged, from claiming the inheritance rights of legitimates. In declining to apply the traditional rational basis test to the statute,[4] the Court, through Mr. Justice Black, provided a discussion of Louisiana property rights, much of which is appropriate here:

4. The Court noted, however, that "[e]ven if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." 401 U.S. at 536 n. 6, 91 S.Ct. at 1019, 28 L.Ed.2d at 292.

"The people of Louisiana, through their legislature have carefully regulated many of the property rights incident to family life. Louisiana law prescribes certain formalities requisite to the contracting of marriage. Once marriage is contracted there, husbands have obligations to their wives. Fathers have obligations to their children. Should the children prosper while the parents fall upon hard times, children have a statutory obligation to support their parents. To further strengthen and preserve family ties, Louisiana regulates the disposition of property upon the death of a family man. The surviving spouse is entitled to an interest in the deceased spouse's estate. Legitimate children have a right of forced heirship in their father's estate and can even retrieve property transferred by their father during his lifetime in reduction of their rightful interests.

. . . . .

"These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which are within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can pro-

vide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collateral relations, as opposed to ascendants, and against ascendants as opposed to descendants. Other rules determining property rights based on family status also 'discriminate' in favor of wives and against 'concubines.' . . . Some of these discriminatory choices are perhaps more closely connected to our conceptions of social justice or of the ways in which most dying men wish to dispose of their property than the Louisiana rules governing illegitimate children. It may be possible that some of these choices are more 'rational' than the choices in Louisiana's categories of illegitimates. *But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.*" We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power

> to make laws for distribution of property left within the State."

401 U.S. at 537-39, 91 S.Ct. at 1020-21, 28 L.Ed.2d at 293. (emphasis added).

Labine and the present case both involve attacks on features of the Louisiana community property system but there is yet another similarity. In *Labine*, the Court emphasized that the statute did not create an insurmountable barrier for the illegitimate child, but that the father could have left as much as one-third of this estate to the child by will had he wished to. Similarly, articles 2334 and 2404 did not present an insurmountable barrier to Ms. Feenstra had she wished to exercise greater control over the community immovables.

Louisiana regards "marriage in no other view than as a contract," La.Civil Code art. 86, and like any other contract, certain requirements and formalities are prescribed by law. The parties must be willing and able to contract. *Id.* art. 90. They must be of a suitable age to contract. La.R.S. 9:282. The consent of each must be freely given, La.Civil Code art. 91, and where the consent has not been freely given or where there has been a mistake as to the identity of a party, the contract may be annulled. *Id.* art. 110.

As with any other contract, each party to the contract of marriage acquires certain rights and owes certain duties. A husband and wife owe the mutual obligations of

"fidelity, support and assistance." *Id.* art. 119. "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children." *Id.* art. 227. The collection of rights and duties of the spouses concerning their matrimonial property, because it arises from the marriage contract, also is contractual.

> "Matrimonial regimes are those plans of order between husband and wife particularizing the manner in which they shall share (if at all) and control their assets and liabilities. Since 1825, all Louisiana matrimonial regimes that might arise upon marriage have been contractual. Under the Digest of 1808, every marriage subject to Louisiana law entailed 'of necessity,' or as a matter of public order, the community of gains as specified in the legislation. Neither a complete separation of property (assets and liabilities) nor a modification of the community of gains could be stipulated by marriage contract; but the spouses could thereby make provisions for donations to each other, donations from other persons to either or both of them and the children to be born of the marriage, a dowry, or any other patrimonial arrangement which did not contradict the community of gains, other imperative laws, or principles of public order or good morals. The Civil Code of 1825, however, permitted the spouses to modify the community of gains in any way and even to exclude it

entirely, leaving them free to enter into a marriage contract specifying any patrimonial arrangement they might confect so long as it did not offend minimal provisions for good public order and morals. The law remains the same today. The community of gains is 'super-induced' by every marriage subject to Louisiana law *only if the spouses either have not entered into a marriage contract, or have entered into one which does not modify or reject that community regime.* This freedom to modify and reject the community of gains changed the character of that regime from one imposed by law to one essentially conventional. Thus, spouses must be deemed to have contracted tacitly the community of gains to the extent they have not contracted expressly against it." (Emphasis supplied)[5]

The contractual nature of the community regime is expressly acknowledged by several Civil Code articles:

"*Article 2325.* In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they are not contrary to good morals, and under the modifications hereinafter prescribed.

5. Pascal, *Updating Louisiana's Community of Gains*, 49 Tul.L.Rev. 555, 555–56 (1975) (footnotes omitted).

"*Article 2332.* The partnership, or community of aquets [acquets] or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

"*Article 2424.* Married persons may, by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or specifying the property belonging to either of them, of which the fruits shall not enter into the partnership [community]."

Moreover, Ms. Feenstra, having failed to protect her home by elimination or modification of the community regime through a marriage contract, was entitled to the protection of article 2334, the very provision which she attacks as unconstitutional had she sought to make it. Article 2404 designates the husband as the head and master of the community and gives him the power to alienate community property without the wife's consent or permission. It is article 2334 that permitted the wife to file a declaration to prevent the alienation without her consent of community immovables standing in the names of both spouses. Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.

The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisiana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Accordingly, the motion of the State of Louisiana for summary judgment on the second counterclaim is GRANTED.

Karl J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

v.

Joan Paillot FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

v.

Edwin W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

No. 77-1991.

United States Court of Appeals, Fifth Circuit.

Dec. 12, 1979.

Attorney who held mortgage on home to secure debt for attorney fees brought suit for a judgment declaring that he had not violated the Truth in Lending Act. The mortgagor's wife counterclaimed for a judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted a family home held as community property to be mortgaged by the husband without the wife's knowledge or consent. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 430 F.Supp. 642, granted a motion for summary judgment against the mortgagor's wife, and she appealed. Thereafter, the claims and counterclaims relating to the truth in lending issue were dismissed by

the parties. The Court of Appeals, Randall, Circuit Judge, held that: (1) there was a justiciable controversy; (2) the Louisiana Code provision designating the husband as the head and master of the community and giving him exclusive power to administer the community estate created a gender-based classification subject to scrutiny under the Fourteenth Amendment; (3) the section was unconstitutional as a denial of equal protection; and (4) the decision was prospective only.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

We consider in this case the constitu-

tionality of article 2404[1] of the Louisiana Civil Code, which establishes the

1. The Legislature of Louisiana completely revised the State's codal provisions relating to matrimonial regimes during the Legislature's 1979 regular session. Most of the revisions, including a new codal provision relating to management of community property, La.Civ. Code Ann. art. 2346 (West Cum.Pamphlet 1979), become effective January 1, 1980. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979). These revisions come too late to benefit Mrs. Feenstra, however. Article 2404 was in effect at all times during her marriage, and provides:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
>
> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

La.Civ.Code Ann. art. 2404 (West 1971). The new provision of the Louisiana Civil Code concerning management of community property, article 2346, provides: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La.Civ.Code Ann. art. 2346 (West Cum. Pamphlet 1979) (effective Jan. 1, 1980).

husband as the head and master of the community estate and gives him the power to alienate the community estate without the consent of the wife.

I

In February 1966, Joan and Harold Feenstra purchased a house in Orleans Parish, Louisiana. In October 1974, Mrs. Feenstra filed a state criminal charge on an unrelated matter against her husband. Mr. Feenstra was incarcerated on the charge, and while in prison he retained Karl J. Kirchberg to represent him in connection with the charge. Mr. Feenstra executed and delivered to Mr. Kirchberg a promissory note in the principal amount of $3,000, bearing interest at 8% per year, in payment of his legal fees. A few days later, Mr. Feenstra executed a mortgage on the Feenstras' family home as security for the payment of the promissory note. The home was the community property of the Feenstras and title was held in the name of both spouses. Mrs. Feenstra eventually

dropped the charges against her husband, and upon his release from jail Mr. Feenstra moved into his own quarters. Subsequently, the Feenstras were legally separated and Mr. Feenstra moved out of Louisiana. After the separation, Mr. Kirchberg demanded payment of the note from Mrs. Feenstra and threatened seizure of her home. In February 1976, with the note remaining unpaid, Mr. Kirchberg petitioned for a mortgage foreclosure by executory process in state court. An order for executory process was issued directing the Civil Sheriff for the Parish of Orleans to seize and sell Mrs. Feenstra's home.

This action began in federal court in March 1976 when Mr. Kirchberg filed a petition for a declaratory judgment against Mrs. Feenstra, seeking a declaration that he was not a creditor under the Truth-in-Lending Act, 15 U.S.C. § 1635(a), and therefore was not liable for any disclosure violation under that Act with respect to the mortgage of the home. Mrs. Feenstra answered the complaint and asserted two counterclaims. In the first, she sought rescission of the mortgage for Truth-in-Lending disclosure violations. In the second, she

sought a declaration that article 2334 [2] of the Louisiana Civil Code (which restricts

2. At the time the mortgage on the Feenstras' family house was executed, article 2334 provided, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West 1971).

This statute was amended in 1976, effective January 1, 1977, to read, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.
>
> Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.
>
> The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West Supp.1979).

A new codal provision relating to alienation of community property, effective January 1, 1980, requires the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables, La.Civ.Code Ann. art. 2347 (West Cum.Pamphlet 1979), although a spouse is still permitted to renounce his or her right to concur, La.Civ.Code Ann. art. 2348 (West Cum.Pamphlet 1979).

the husband's power to alienate community immovables standing in the name of both spouses) was unconstitutional because it violated the equal protection and due process clauses of the fourteenth amendment. Mrs. Feenstra's second counterclaim was asserted against Edwin W. Edwards (the Governor of the State of Louisiana) and the State of Louisiana, as well as against Mr. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim, and Mr. Kirchberg adopted that motion as his own. After oral argument was heard and supplemental memoranda were filed, the district court granted the motion for summary judgment against Mrs. Feenstra, and Mrs. Feenstra appealed to this court. Mr. Kirchberg and Mrs. Feenstra subsequently dismissed their claim and counterclaim against each other on the Truth-in-Lending issue.

In ruling on the motion of the State of Louisiana for summary judgment, the district court correctly considered Mrs. Feenstra's complaint as directly primarily at article 2404 of the Louisiana Civil Code, which designates the husband as the head and master of the community and gives him the exclusive power to administer the community estate, rather than at article 2334, which restricts the husband's power to alienate community immovables standing in the name of both spouses. Article 2404 was the source of Mrs. Feenstra's misfortune; without it Mr. Feenstra would have had no power to encumber the family home without her consent.

[1] We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment and we reverse. In so doing, we apply our decision prospectively.[3] Further, we note that, effective January 1, 1980, the Louisiana Legislature has completely revised the provisions of the Louisiana Civil Code relating to matrimonial regimes and in so doing has eliminated the head and master concept altogether.[4]

II

We address first the position asserted by the State of Louisiana to the effect that no case or controversy sufficient to permit the exercise of the judicial power of the United States by this court is presented here and that the issues raised

3. *See* Part IV *infra*.

4. *See generally* La.Civ.Code Ann. arts. 2325 2376 (West Cum.Pamphlet 1979).

by Mrs. Feenstra are moot.[5] The State's position appears to be based in part upon an inaccurate description of the state of the record. The State asserts that Mrs. Feenstra has dismissed her counterclaims against Mr. Kirchberg, that Mr. Kirchberg has dismissed his complaint against Mrs. Feenstra and that the only parties remaining are Mrs. Feenstra, in her capacity as a third party plaintiff, and the third party defendants, Governor Ed-

5. *See* U.S.Const. art. III, § 2. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), Chief Justice Hughes characterized the jurisdictional "case or controversy" requirement as follows:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240-41, 57 S.Ct. at 464 (citations omitted).

Mrs. Feenstra's second counterclaim seeks a declaration, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), that the challenged Louisiana statute is unconstitutional. Section 2201 limits the availability of declaratory relief to cases of "actual controversy." *Id.* § 2201.

wards and the State of Louisiana. Our review of the record indicates, to the contrary, that Mrs. Feenstra's second counterclaim, in which Mr. Kirchberg, Governor Edwards and the State of Louisiana are named as defendants, has not been dismissed and that her challenge therein (as viewed by the district court) to the constitutionality of article 2404 of the Louisiana Civil Code is before this court on appeal from the summary judgment entered against her on her second counterclaim by the district court.

[2] The State further asserts that Mrs. Feenstra no longer presents her challenge to article 2404 in the context of a specific live grievance and that Mrs. Feenstra does not indicate that she is faced with a real or immediate threat of injury. The State's position is, again, totally unsupported by the record, and at oral argument we were assured by Mrs. Feenstra's counsel that the mortgage still exists on Mrs. Feenstra's home, that the order directing the Civil Sheriff for the Parish of Orleans to seize and sell the home is still in effect and that the threat of losing her home is, accordingly, a real one. We conclude, therefore, that the controversy between Mrs. Feenstra and Mr. Kirchberg described in Mrs. Feenstra's second counterclaim is neither academic nor moot and that an actual controversy, as required by article III of the Constitution and the Federal Declaratory Judgment Act, exists here, rendering appropriate review by this court of the decision of the district court.

III

Our analysis must begin with a consideration of the nature of the matrimonial regime under Louisiana law.

Article 86 of the Louisiana Civil Code states that: "The law considers marriage in no other view than as a civil contract."[6] In order to enter into a marriage contract, the parties must be willing and able to contract;[7] they must freely consent;[8] and they must contract pursuant to the forms and solemnities prescribed by law.[9]

Insofar as the property of married persons is concerned, article 2334 of the Louisiana Civil Code divides such property into separate and common property. Under article 2334, common property is that which is acquired by the husband and wife during marriage in any manner different from that specified in article 2334 for the acquisition of separate property. However, under articles 2325, 2332 and 2424[10] of the Code, the parties entering into a marriage contract may, in that contract, modify, limit or entirely reject the regime established by article 2334. In the language of article 2332, "[t]he partnership, or community of

6. La.Civ.Code Ann. art. 86 (West 1952).
7. *Id.* art. 90.
8. *Id.* art. 91.
9. La.Civ.Code Ann. art. 2328 (West 1971).
10. *Id.* arts. 2325, 2332, 2424.

aquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist." [11]

The management of property that under article 2334 is common property is given by article 2404 of the Louisiana Civil Code to the husband:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Finally, article 2334, as it existed in 1974,[12] contained a restriction on the right of the husband, under article 2404, to alienate common property without the consent and permission of the wife:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the hus-

11. We have assumed in deciding this appeal that the parties to a marriage in Louisiana could contractually retain a community property arrangement and merely substitute the wife for the husband as manager of the community. Of course, if article 2404 requires that the husband be the manager of any community, whether established by operation of law or by contract, our analysis of the constitutionality of the statute would not be affected.

12. *See* note 2, *supra*.

band without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

Because of the contractual nature of marriages generally under Louisiana law and because the parties to a marriage contract have the right to alter the community regime, the State of Louisiana argues that the parties to a marriage contract (such as Mr. and Mrs. Feenstra) in which no provision has been made to alter the community regime have freely and tacitly contracted *for* the community regime. The State further asserts that a wife (such as Mrs. Feenstra) who fails to file the declaration contemplated by the last paragraph of article 2334, and thereby to limit her husband's power to encumber or dispose of immovable property standing in the name of both husband and wife without her consent, has freely consented to any encumbrance or disposition of that property which he might make. These arguments convert Mrs. Feenstra's predicament from one which is statutorily imposed—and therefore within the reach of the fourteenth amendment—to one which has been freely chosen by Mrs. Feenstra—and therefore beyond the reach of the fourteenth amendment. The district court agreed:

Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.

The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisiana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Kirchberg v. Feenstra, 430 F.Supp. 642, 648 (E.D.La.1977).

[3–5] While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law—article 2404 of the Louisiana Civil Code—is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is

made by the government, the obligation to afford all persons the equal protection of the laws arises.[13]

13. *See Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975). *Cf. Trimble v. Gordon*, 430 U.S. 762, 775 n.16, 97 S.Ct. 1459, 1467 n.16, 52 L.Ed.2d 31 (1977). We reject the argument that the matrimonial regime that governs marriages in Louisiana absent an antenuptial agreement is the free choice of the parties to a marriage. First, as was said in *Trimble*, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Id.* Second, the *Trimble* Court also expressed doubt that, at least when the disadvantaged group has been a frequent target of discrimination, a state may constitutionally place on individual members of that group the burden of overcoming a statutory presumption about their intentions or about the intentions of others directly affecting them. Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. Finally, as we discuss in text below, even were all couples adequately informed before marriage about the statutory presumption and how to avoid it, the choice presented by the State of Louisiana is hardly an even-handed one. It is more expensive for a couple to provide the wife with some legally-enforceable right to participate in the fundamental family decisions about the disposition of community property than it is for them to leave all those decisions to the husband. The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

[6–8] Having established that a choice has been made for the Feenstras by Louisiana law, the next question for consideration is whether the nature of the choice—the designation of the husband as the manager of the community estate—is a classification by gender. It is clear that insofar as the management of the community estate is concerned, several different methods of management are possible. The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife acting jointly or by the husband or wife acting concurrently.[14] The State of Louisiana has chosen one—management by the husband alone—and in so doing has established a gender-based classification subject to scrutiny under the fourteenth amendment. The State urges that because a couple contemplating marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them and, accordingly, no state-imposed

14. The Legislature of Louisiana has provided for concurrent management of community property in its recent revision of the law regulating matrimonial regimes. *See* note 1, *supra*.

gender-based classification.[15] This analysis, however, fails to take into account the fact that Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager, and it does not place that burden and expense on couples wishing to make the husband the manager. That it places the same burden on couples seeking other non-traditional community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, the Louisiana law extends a benefit to men that is not extended to

15. Discrimination need not amount to an absolute prohibition to be condemned by the fourteenth amendment. What the Constitution condemns is a statute providing for different treatment of similarly situated individuals based on gender when that discrimination among individuals is not substantially related to achieving an important governmental objective. *See* note 16, *infra*. The discrimination in this case is that the State establishes a burdensome requirement for couples wishing to give the wife a legally-enforceable right to participate in the management of the community property, whereas no such burden is placed on couples wishing to vest entire managerial control in the husband. We do not see how this burden can be avoided under Louisiana law. Even if it could be avoided, we think the Supreme Court has rejected the notion that an insurmountable barrier is necessary to render a legislative classification unconstitutional. *Trimble v. Gordon*, 430 U.S. 762, 773–74, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis.

[9–11] The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test: "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [16] Inherent in this analysis is a balancing process by which a court

16. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The requirement of a substantial relationship between the classification by gender and the achievement of the important governmental objective necessarily involves an inquiry whether there are less discriminatory methods available to the state to achieve the same objective. *See Orr v. Orr*, 440 U.S. 268, 280-281, 99 S.Ct. 1102, 1112-1113, 59 L.Ed.2d 306, 320-21 (1979).

The role of gender as a basis for legislative classifications continues to be a significant issue in our society, and the Supreme Court has been faced with the issue many times in the past nine years. *See generally Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). *Cf. Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (exclusion of pregnancy benefits not gender-based classification).

weighs the state interest sought to be furthered against the character of the discrimination caused by the statutory classification. If the court concludes that the government interest is insufficient or the legislative classification is not substantially related to achieving that interest, the statute is an unconstitutional denial of equal protection under the fourteenth amendment.

[12, 13] Because the district court declined to apply equal protection analysis to article 2404 of the Louisiana Civil Code, we are unable to look to the district court's opinion for guidance on the specific governmental objective sought to be achieved by article 2404.[17] The State of Louisiana, having devoted half

17. The district court relied on *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1970), for the proposition that equal protection analysis is inappropriate in an area in which a state has extensively and carefully regulated the conduct of its citizens with respect to rights and obligations that are peculiarly matters of state interest and concern. Seven years later, commenting on its deferential approach to the statute at issue in *Labine*, the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) said: "Despite [the differences between the Louisiana statute at issue in *Labine* and the Illinois statute at issue here], it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17, 97 S.Ct. at 1468 n.17. When a federal court is presented with a con-

of its brief to the argument that there is no case or controversy here, has given us only *one sentence* on the state objective to be achieved in article 2404: "One of the two spouses has to be designated as the manager of the community." If the State means that it has a valid governmental interest in providing in its marital or community property laws for the way in which community property is managed, then that is a position with which we could scarcely disagree. However, the State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, *i. e.*, the selection of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective. Since article 2404 clearly discriminates against women as community managers or co-managers, the State must show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such

stitutional challenge to one aspect of a complex and comprehensive structure of state legislation, its responsibility is to focus as closely as possible upon the challenged provision, with due regard for preserving the soundness of the entire structure while removing any constitutionally infirm provisions; but if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall.

a showing. The decision of the Louisiana Legislature to adopt a law providing for a gender-neutral method of community management, effective January 1, 1980, while not dispositive of the issue before this court, suggests that such a showing would not be possible. Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion.[18]

IV

[14] We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be

18. Although Mrs. Feenstra brought her second counterclaim as a challenge to article 2334, the relevant portion of that statute, *see* note 2, *supra*, acted only to limit the husband's rights as head and master of the community property as provided in article 2404. Our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana, renders unnecessary a decision on the limiting portion of article 2334.

> considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318-319, 84 L.Ed. 329 (1940). The concept of the husband as head and master of the community of gains has been a part of Louisiana law since 1808, Louisiana Civil Code of 1808, art. 66, and before that first codification of Louisiana law it was apparently part of the Spanish Civil Law effective in that region at the time of the Louisiana Purchase, *see, e. g.*, Pugh, *The Spanish Community of Gains in 1803*: Sociedad De Gananciales, 30 La.L.Rev. 1, 13 (1969). Since our decision could produce substantial inequitable results if applied retroactively, we avoid that "injustice or hardship" through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

REVERSED.

Karl J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

v.

Joan Paillot FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

v.

Edwin W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

No. 77-1991.

United States Court of Appeals, Fifth Circuit.

Dec. 12, 1979.

Attorney who held mortgage on home to secure debt for attorney fees brought suit for a judgment declaring that he had not violated the Truth in Lending Act. The mortgagor's wife counterclaimed for a judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted a family home held as community property to be mortgaged by the husband without the wife's knowledge or consent. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 430 F.Supp. 642, granted a motion for summary judgment against the mortgagor's wife, and she appealed. Thereafter, the claims and counterclaims relating to the

truth in lending issue were dismissed by the parties. The Court of Appeals, Randall, Circuit Judge, held that: (1) there was a justiciable controversy; (2) the Louisiana Code provision designating the husband as the head and master of the community and giving him exclusive power to administer the community estate created a gender-based classification subject to scrutiny under the Fourteenth Amendment; (3) the section was unconstitutional as a denial of equal protection; and (4) the decision was prospective only.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

We consider in this case the constitutionality of article 2404[1] of the Louisi-

1. The Legislature of Louisiana completely revised the State's codal provisions relating to matrimonial regimes during the Legislature's 1979 regular session. Most of the revisions, including a new codal provision relating to management of community property, La.Civ. Code Ann. art. 2346 (West Cum.Pamphlet 1979), become effective January 1, 1980. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979). These revisions come too late to benefit Mrs. Feenstra, however. Article 2404 was in effect at all times during her marriage, and provides:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
>
> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

La.Civ.Code Ann. art. 2404 (West 1971). The new provision of the Louisiana Civil Code concerning management of community property, article 2346, provides: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La.Civ.Code Ann. art. 2346 (West Cum. Pamphlet 1979) (effective Jan. 1, 1980).

ana Civil Code, which establishes the husband as the head and master of the community estate and gives him the power to alienate the community estate without the consent of the wife.

I

In February 1966, Joan and Harold Feenstra purchased a house in Orleans Parish, Louisiana. In October 1974, Mrs. Feenstra filed a state criminal charge on an unrelated matter against her husband. Mr. Feenstra was incarcerated on the charge, and while in prison he retained Karl J. Kirchberg to represent him in connection with the charge. Mr. Feenstra executed and delivered to Mr. Kirchberg a promissory note in the principal amount of $3,000, bearing interest at 8% per year, in payment of his legal fees. A few days later, Mr. Feenstra executed a mortgage on the Feenstras' family home as security for the payment of the promissory note. The home was the community property of the Feenstras and title was held in the name of both spouses. Mrs. Feenstra eventually dropped the charges against her husband, and upon his release from jail Mr. Feenstra moved into his own quarters. Subsequently, the Feenstras were legally separated and Mr. Feenstra moved out of Louisiana. After the separation, Mr. Kirchberg demanded payment of the

note from Mrs. Feenstra and threatened seizure of her home. In February 1976, with the note remaining unpaid, Mr. Kirchberg petitioned for a mortgage foreclosure by executory process in state court. An order for executory process was issued directing the Civil Sheriff for the Parish of Orleans to seize and sell Mrs. Feenstra's home.

This action began in federal court in March 1976 when Mr. Kirchberg filed a petition for a declaratory judgment against Mrs. Feenstra, seeking a declaration that he was not a creditor under the Truth-in-Lending Act, 15 U.S.C. § 1635(a), and therefore was not liable for any disclosure violation under that Act with respect to the mortgage of the home. Mrs. Feenstra answered the complaint and asserted two counterclaims. In the first, she sought rescission of the mortgage for Truth-in-Lending disclosure violations. In the second, she sought a declaration that article 2334 [2] of the Louisiana Civil Code (which restricts the husband's power to alienate community immovables standing in the name of both spouses) was unconstitutional because it violated the equal protection and due process clauses of the fourteenth amendment. Mrs. Feenstra's second counterclaim was asserted against Edwin W. Edwards (the Governor of the State of Louisiana) and the State of Louisiana,

2. At the time the mortgage on the Feenstras' family house was executed, article 2334 provided, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written

as well as against Mr. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim, and Mr. Kirchberg adopted that motion as his own. After oral argument was heard and supplemental memoranda were filed, the district court

> authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West 1971).

This statute was amended in 1976, effective January 1, 1977, to read, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.
>
> Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.
>
> The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West Supp.1979).

A new codal provision relating to alienation of community property, effective January 1, 1980, requires the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables, La.Civ.Code Ann. art. 2347 (West Cum.Pamphlet 1979), although a spouse is still permitted to renounce his or her right to concur, La.Civ.Code Ann. art. 2348 (West Cum.Pamphlet 1979).

granted the motion for summary judgment against Mrs. Feenstra, and Mrs. Feenstra appealed to this court. Mr. Kirchberg and Mrs. Feenstra subsequently dismissed their claim and counterclaim against each other on the Truth-in-Lending issue.

In ruling on the motion of the State of Louisiana for summary judgment, the district court correctly considered Mrs. Feenstra's complaint as directed primarily at article 2404 of the Louisiana Civil Code, which designates the husband as the head and master of the community and gives him the exclusive power to administer the community estate, rather than at article 2334, which restricts the husband's power to alienate community immovables standing in the name of both spouses. Article 2404 was the source of Mrs. Feenstra's misfortune; without it Mr. Feenstra would have had no power to encumber the family home without her consent.

[1] We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment and we reverse.[3] In so do-

3. In April, 1978, the Supreme Court of Louisiana reversed a decision of the Civil District Court of the Parish of Orleans declaring articles 2404 and 2334 unconstitutional. *Corpus Christi Parish Credit Union v. Martin*, 358 So.2d 295 (La.), *cert. denied*, 439 U.S. 897, 99 S.Ct. 261, 58 L.Ed.2d 245 (1978). In reversing the Civil District Court, the Supreme Court specifically declined to rule on the constitutionality of article 2404 and article 2334. Instead, the Supreme Court held that the mortgage at issue in that case was valid on the theory that

ing, we apply our decision prospectively.[4] Further, we note that, effective January 1, 1980, the Louisiana Legislature has completely revised the provisions of the Louisiana Civil Code relating to matrimonial regimes and in so doing has eliminated the head and master concept altogether.[5]

II

We address first the position asserted by the State of Louisiana to the effect that no case or controversy sufficient to permit the exercise of the judicial power of the United States by this court is presented here and that the issues raised by Mrs. Feenstra are moot.[6] The State's

the wife could have prevented the mortgage by exercising her right under a Louisiana statute (La.Rev.Stat.Ann. § 9:2802 (West 1951)) similar to article 2334. Judges Tate, Calogero and Dennis of the Supreme Court of Louisiana dissented. The dissenting opinion stated that the issue of the constitutionality of articles 2404 and 2334 could not, in the view of the dissenting Judges, be avoided and that the statutes "are obviously unconstitutional" as a denial of the equal protection of the laws under the fourteenth amendment.

4. *See* Part IV *infra*.

5. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979).

6. *See* U.S.Const. art. III, § 2. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), Chief Justice Hughes characterized the jurisdictional "case or controversy" requirement as follows:

> A "controversy" in this sense must be one that is appropriate for judicial determina-

position appears to be based in part upon an inaccurate description of the state of the record. The State asserts that Mrs. Feenstra has dismissed her counterclaims against Mr. Kirchberg, that Mr. Kirchberg has dismissed his complaint against Mrs. Feenstra and that the only parties remaining are Mrs. Feenstra, in her capacity as a third party plaintiff, and the third party defendants, Governor Edwards and the State of Louisiana. Our review of the record indicates, to the contrary, that Mrs. Feenstra's second counterclaim, in which Mr. Kirchberg, Governor Edwards and the State of Louisiana are named as defendants, has not been dismissed and that her challenge therein (as viewed by the district court) to the constitutionality of article 2404 of the Louisiana Civil Code is before this court on appeal from the summary judgment entered against her on her second counterclaim by the district court.

> tion. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240–41, 57 S.Ct. at 464 (citations omitted).

Mrs. Feenstra's second counterclaim seeks a declaration, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), that the challenged Louisiana statute is unconstitutional. Section 2201 limits the availability of declaratory relief to cases of "actual controversy." *Id.* § 2201.

[2] The State further asserts that Mrs. Feenstra no longer presents her challenge to article 2404 in the context of a specific live grievance and that Mrs. Feenstra does not indicate that she is faced with a real or immediate threat of injury. The State's position is, again, totally unsupported by the record, and at oral argument we were assured by Mrs. Feenstra's counsel that the mortgage still exists on Mrs. Feenstra's home, that the order directing the Civil Sheriff for the Parish of Orleans to seize and sell the home is still in effect and that the threat of losing her home is, accordingly, a real one. We conclude, therefore, that the controversy between Mrs. Feenstra and Mr. Kirchberg described in Mrs. Feenstra's second counterclaim is neither academic nor moot and that an actual controversy, as required by article III of the Constitution and the Federal Declaratory Judgment Act, exists here, rendering appropriate review by this court of the decision of the district court.

III

Our analysis must begin with a consideration of the nature of the matrimonial regime under Louisiana law.

Article 86 of the Louisiana Civil Code states that: "The law considers marriage in no other view than as a civil contract."[7] In order to enter into a mar-

7. La.Civ.Code Ann. art. 86 (West 1952).

riage contract, the parties must be willing and able to contract;[8] they must freely consent;[9] and they must contract pursuant to the forms and solemnities prescribed by law.[10]

Insofar as the property of married persons is concerned, article 2334 of the Louisiana Civil Code divides such property into separate and common property. Under article 2334, common property is that which is acquired by the husband and wife during marriage in any manner different from that specified in article 2334 for the acquisition of separate property. However, under articles 2325, 2332 and 2424[11] of the Code, the parties entering into a marriage contract may, in that contract, modify, limit or entirely reject the regime established by article 2334. In the language of article 2332, "[t]he partnership, or community of aquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist."[12]

8. *Id.* art. 90.

9. *Id.* art. 91.

10. La.Civ.Code Ann. art. 2328 (West 1971).

11. *Id.* arts. 2325, 2332, 2424.

12. We have assumed in deciding this appeal that the parties to a marriage in Louisiana could contractually retain a community prop-

The management of property that under article 2334 is common property is given by article 2404 of the Louisiana Civil Code to the husband:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Finally, article 2334, as it existed in 1974,[13] contained a restriction on the right of the husband, under article 2404, to alienate common property without the consent and permission of the wife:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

erty arrangement and merely substitute the wife for the husband as manager of the community. Of course, if article 2404 requires that the husband be the manager of any community, whether established by operation of law or by contract, our analysis of the constitutionality of the statute would not be affected.

13. *See* note 2, *supra*.

Because of the contractual nature of marriages generally under Louisiana law and because the parties to a marriage contract have the right to alter the community regime, the State of Louisiana argues that the parties to a marriage contract (such as Mr. and Mrs. Feenstra) in which no provision has been made to alter the community regime have freely and tacitly contracted *for* the community regime. The State further asserts that a wife (such as Mrs. Feenstra) who fails to file the declaration contemplated by the last paragraph of article 2334, and thereby to limit her husband's power to encumber or dispose of immovable property standing in the name of both husband and wife without her consent, has freely consented to any encumbrance or disposition of that property which he might make. These arguments convert Mrs. Feenstra's predicament from one which is statutorily imposed—and therefore within the reach of the fourteenth amendment—to one which has been freely chosen by Mrs. Feenstra—and therefore beyond the reach of the fourteenth amendment. The district court agreed:

> Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.
>
> The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisi-

ana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Kirchberg v. Feenstra, 430 F.Supp. 642, 648 (E.D.La.1977).

[3–5] While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law—article 2404 of the Louisiana Civil Code—is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is made by the government, the obligation to afford all persons the equal protection of the laws arises.[14]

14. *See Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975). *Cf. Trimble v. Gordon*, 430 U.S. 762, 775 n.16, 97 S.Ct. 1459, 1467 n.16, 52 L.Ed.2d 31 (1977). We reject the argument that the matrimonial regime that governs marriages in Louisiana absent an antenuptial

[6–8] Having established that a choice has been made for the Feenstras by Louisiana law, the next question for consideration is whether the nature of the choice—the designation of the husband as the manager of the community estate—is a classification by gender. It is clear that insofar as the management of the community estate is concerned, several different methods of management are possible. The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife act-

agreement is the free choice of the parties to a marriage. First, as was said in *Trimble*, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Id.* Second, the *Trimble* Court also expressed doubt that, at least when the disadvantaged group has been a frequent target of discrimination, a state may constitutionally place on individual members of that group the burden of overcoming a statutory presumption about their intentions or about the intentions of others directly affecting them. Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. Finally,

ing jointly, or by either the husband or wife acting concurrently.[15] The State of Louisiana has chosen one—management by the husband alone—and in so doing has established a gender-based classification subject to scrutiny under the fourteenth amendment. The State urges that because a couple contemplating marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them and, accordingly, no state-imposed

as we discuss in text below, even were all couples adequately informed before marriage about the statutory presumption and how to avoid it, the choice presented by the State of Louisiana is hardly an even-handed one. It is more expensive for a couple to provide the wife with some legally-enforceable right to participate in the fundamental family decisions about the disposition of community property than it is for them to leave all those decisions to the husband. The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

15. The Legislature of Louisiana has provided for concurrent management of community property in its recent revision of the law regulating matrimonial regimes. *See* note 1, *supra*.

gender-based classification.[16] This analysis, however, fails to take into account the fact that Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager, and it does not place that burden and expense on couples wishing to make the husband the manager. That it places the same burden on couples seeking other non-traditional forms of community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, the Louisiana law extends

16. Discrimination need not amount to an absolute prohibition to be condemned by the fourteenth amendment. What the Constitution condemns is a statute providing for different treatment of similarly situated individuals based on gender when that discrimination among individuals is not substantially related to achieving an important governmental objective. *See* note 17, *infra*. The discrimination in this case is that the State establishes a burdensome requirement for couples wishing to give the wife a legally-enforceable right to participate in the management of the community property, whereas no such burden is placed on couples wishing to vest entire managerial control in the husband. We do not see how this burden can be avoided under Louisiana law. Even if it could be avoided, we think the Supreme Court has rejected the notion that an insurmountable barrier is necessary to render a legislative classification unconstitutional.

a benefit to men that is not extended to women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis.

[9–11] The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test: "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [17] Inherent in this analysis is a

Trimble v. Gordon, 430 U.S. 762, 773–74, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

17. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The requirement of a substantial relationship between the classification by gender and the achievement of the important governmental objective necessarily involves an inquiry whether there are less discriminatory methods available to the state to achieve the same objective. *See Orr v. Orr*, 440 U.S. 268, 280–281, 99 S.Ct. 1102, 1112–1113, 59 L.Ed.2d 306, 320–21 (1979).

The role of gender as a basis for legislative classifications continues to be a significant issue in our society, and the Supreme Court has been faced with the issue many times in the past nine years. *See generally Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43

balancing process by which a court weighs the state interest sought to be furthered against the character of the discrimination caused by the statutory classification. If the court concludes that the government interest is insufficient or the legislative classification is not substantially related to achieving that interest, the statute is an unconstitutional denial of equal protection under the fourteenth amendment.

[12, 13] Because the district court declined to apply equal protection analysis to article 2404 of the Louisiana Civil Code, we are unable to look to the district court's opinion for guidance on the specific governmental objective sought to be achieved by article 2404.[18] The State of Louisiana, having devoted half of its brief to the argument that there is no case or controversy here, has given us only *one sentence* on the state objective to be achieved in article 2404: "One of the two spouses has to be designated as the manager of the community." If the State means that it has a valid govern-

L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). *Cf. Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (exclusion of pregnancy benefits from state insurance program not gender-based classification).

18. The district court relied on *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1970), for the proposition that equal pro-

mental interest in providing in its marital or community property laws for the way in which community property is managed, then that is a position with which we could scarcely disagree. However, the State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, *i. e.*, the selection of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective. Since article 2404 clearly discriminates against women as community managers or co-managers, the State must

tection analysis is inappropriate in an area in which a state has extensively and carefully regulated the conduct of its citizens with respect to rights and obligations that are peculiarly matters of state interest and concern. Seven years later, commenting on its deferential approach to the statute at issue in *Labine*, the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) said: "Despite [the differences between the Louisiana statute at issue in *Labine* and the Illinois statute at issue here], it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17, 97 S.Ct. at 1468 n.17. When a federal court is presented with a constitutional challenge to one aspect of a complex and comprehensive structure of state legislation, its responsibility is to focus as closely as possible upon the challenged provision, with due regard for preserving the soundness of the entire structure while removing any constitutionally infirm provisions; but if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall.

show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such a showing. The decision of the Louisiana Legislature to adopt a law providing for a gender-neutral method of community management, effective January 1, 1980, while not dispositive of the issue before this court, suggests that such a showing would not be possible. Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion.[19]

19. Although Mrs. Feenstra brought her second counterclaim as a challenge to article 2334, the relevant portion of that statute, *see* note 2, *supra*, acted only to limit the husband's rights as head and master of the community property as provided in article 2404. Our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana, renders unnecessary a decision on the limiting portion of article 2334.

IV

[14] We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318–319, 84 L.Ed. 329 (1940). The concept of the husband as head and master of the community of gains has been a part of Louisiana law since 1808, Louisiana Civil Code of 1808, art. 66, and before that first codification of Louisiana law it was apparently part of the Span-

ish Civil Law effective in that region at the time of the Louisiana Purchase, *see, e. g.*, Pugh, *The Spanish Community of Gains in 1803*: Sociedad De Gananciales, 30 La.L.Rev. 1, 13 (1969). Since our decision could produce substantial inequitable results if applied retroactively, we avoid that "injustice or hardship" through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

REVERSED.

Karl J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

v.

Joan Paillot FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

v.

Edwin W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

No. 77-1991.

United States Court of Appeals, Fifth Circuit.

Dec. 12, 1979.

Attorney who held mortgage on home to secure debt for attorney fees brought suit for a judgment declaring that he had not violated the Truth in Lending Act. The mortgagor's wife counterclaimed for a judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted a family home held as community property to be mortgaged by the husband without the wife's knowledge or consent. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 430 F.Supp. 642, granted a motion for summary judgment against the mortgagor's wife, and she appealed. Thereafter, the claims and counterclaims relating to the truth in lending issue were dismissed by the parties. The Court of Appeals, Randall, Circuit Judge, held that: (1) there was a justiciable controversy; (2) the Louisiana Code provi-

sion designating the husband as the head and master of the community and giving him exclusive power to administer the community estate created a gender-based classification subject to scrutiny under the Fourteenth Amendment; (3) the section was unconstitutional as a denial of equal protection; and (4) the decision was prospective only.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

We consider in this case the constitutionality of article 2404 [1] of the Louisiana Civil Code, which establishes the husband as the head and master of the community estate and gives him the power to alienate the community estate without the consent of the wife.

I

In February 1966, Joan and Harold Feenstra purchased a house in Orleans Parish, Louisiana. In October 1974, Mrs. Feenstra filed a state criminal charge on an unrelated matter against her husband. Mr.

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Feenstra was incarcerated on the charge, and while in prison he retained Karl J. Kirchberg to represent him in connection with the charge. Mr. Feenstra executed and delivered to Mr. Kirchberg a promissory note in the principal amount of $3,000,

1979 regular session. Most of the revisions, including a new codal provision relating to management of community property, La.Civ. Code Ann. art. 2346 (West Cum.Pamphlet 1979), become effective January 1, 1980. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979). These revisions come too late to benefit Mrs. Feenstra, however. Article 2404 was in effect at all times during her marriage, and provides:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
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> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

La.Civ.Code Ann. art. 2404 (West 1971). The new provision of the Louisiana Civil Code concerning management of community property, article 2346, provides: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La.Civ.Code Ann. art. 2346 (West Cum. Pamphlet 1979) (effective Jan. 1, 1980).

bearing interest at 8% per year, in payment of his legal fees. A few days later, Mr. Feenstra executed a mortgage on the Feenstras' family home as security for the payment of the promissory note. The home was the community property of the Feenstras and title was held in the name of both spouses. Mrs. Feenstra eventually dropped the charges against her husband, and upon his release from jail Mr. Feenstra moved into his own quarters. Subsequently, the Feenstras were legally separated and Mr. Feenstra moved out of Louisiana. After the separation, Mr. Kirchberg demanded payment of the note from Mrs. Feenstra and threatened seizure of her home. In February 1976, with the note remaining unpaid, Mr. Kirchberg petitioned for a mortgage foreclosure by executory process in state court. An order for executory process was issued directing the Civil Sheriff for the Parish of Orleans to seize and sell Mrs. Feenstra's home.

This action began in federal court in March 1976 when Mr. Kirchberg filed a petition for a declaratory judgment against Mrs. Feenstra, seeking a declaration that he was not a creditor under the Truth-in-Lending Act, 15 U.S.C. § 1635(a), and therefore was not liable for any disclosure violation under that Act with respect to the mortgage of the home. Mrs. Feenstra answered the complaint and asserted two counterclaims. In the first, she sought rescission of the mortgage for Truth-in-Lending disclosure violations. In the second, she sought a

declaration that article 2334 [2] of the Louisiana Civil Code (which restricts the husband's power to alienate community immovables standing in the name of both spouses) was unconstitutional because it violated the equal protection and due process clauses of the fourteenth amendment. Mrs.

2. At the time the mortgage on the Feenstras' family house was executed, article 2334 provided, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West 1971).

This statute was amended in 1976, effective January 1, 1977, to read, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.
>
> Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.
>
> The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West Supp.1979).

A new codal provision relating to alienation of community property, effective January 1, 1980, requires the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables, La.Civ.Code Ann. art. 2347 (West Cum.Pamphlet 1979), although a spouse is still permitted to renounce his or her right to concur, La.Civ.Code Ann. art. 2348 (West Cum.Pamphlet 1979).

Feenstra's second counterclaim was asserted against Edwin W. Edwards (the Governor of the State of Louisiana) and the State of Louisiana, as well as against Mr. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim, and Mr. Kirchberg adopted that motion as his own. After oral argument was heard and supplemental memoranda were filed, the district court granted the motion for summary judgment against Mrs. Feenstra, and Mrs. Feenstra appealed to this court. Mr. Kirchberg and Mrs. Feenstra subsequently dismissed their claim and counterclaim against each other on the Truth-in-Lending issue.

In ruling on the motion of the State of Louisiana for summary judgment, the district court correctly considered Mrs. Feenstra's complaint as directed primarily at article 2404 of the Louisiana Civil Code, which designates the husband as the head and master of the community and gives him the exclusive power to administer the community estate, rather than at article 2334, which restricts the husband's power to alienate community immovables standing in the name of both spouses. Article 2404 was the source of Mrs. Feenstra's misfortune; without it Mr. Feenstra would have had no power to encumber the family home without her consent.

[1] We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment and we reverse.[3] In so doing, we apply our decision prospectively.[4] Further, we note that, effective January 1, 1980, the Louisiana Legislature has completely revised the provisions of the Louisiana Civil Code relating to matrimonial regimes and in so doing has eliminated the head and master concept altogether.[5]

II

We address first the position asserted by the State of Louisiana to the effect that no case or controversy sufficient to permit the exercise of the judicial power of the United States by this court is presented here and

3. In April, 1978, the Supreme Court of Louisiana reversed a decision of the Civil District Court of the Parish of Orleans declaring articles 2404 and 2334 unconstitutional. *Corpus Christi Parish Credit Union v. Martin*, 358 So.2d 295 (La.), *cert. denied*, 439 U.S. 897, 99 S.Ct. 261, 58 L.Ed.2d 245 (1978). In reversing the Civil District Court, the Supreme Court specifically declined to rule on the constitutionality of articles 2404 and 2334. Instead, the Supreme Court held that the mortgage at issue in that case was valid on the theory that the wife could have prevented the mortgage by exercising her right under a Louisiana statute (La.Rev.Stat.Ann. § 9:2802 (West 1951)) similar to article 2334. Judges Tate, Calogero and Dennis of the Supreme Court of Louisiana dissented. The dissenting opinion stated that the issue of the constitutionality of articles 2404 and 2334 could not, in the view of the dissenting Judges, be avoided and that the statutes "are obviously inconstitutional" as a denial of the equal protection of the laws under the fourteenth amendment.

4. *See* Part IV *infra*.

5. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979).

that the issues raised by Mrs. Feenstra are moot.[6] The State's position appears to be based in part upon an inaccurate description of the state of the record. The State asserts that Mrs. Feenstra has dismissed her counterclaims against Mr. Kirchberg, that Mr. Kirchberg has dismissed his complaint against Mrs. Feenstra and that the only parties remaining are Mrs. Feenstra, in her capacity as a third party plaintiff, and the third party defendants, Governor Edwards and the State of Louisiana. Our review of the record indicates, to the contrary, that Mrs. Feenstra's second counterclaim, in

6. *See* U.S.Const. art. III, § 2. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), Chief Justice Hughes characterized the jurisdictional "case or controversy" requirement as follows:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240–41, 57 S.Ct. at 464 (citations omitted).

Mrs. Feenstra's second counterclaim seeks a declaration, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), that the challenged Louisiana statute is unconstitutional. Section 2201 limits the availability of declaratory relief to cases of "actual controversy." *Id.* § 2201.

which Mr. Kirchberg, Governor Edwards and the State of Louisiana are named as defendants, has not been dismissed and that her challenge therein (as viewed by the district court) to the constitutionality of article 2404 of the Louisiana Civil Code is before this court on appeal from the summary judgment entered against her on her second counterclaim by the district court.

[2] The State further asserts that Mrs. Feenstra no longer presents her challenge to article 2404 in the context of a specific live grievance and that Mrs. Feenstra does not indicate that she is faced with a real or immediate threat of injury. The State's position is, again, totally unsupported by the record, and at oral argument we were assured by Mrs. Feenstra's counsel that the mortgage still exists on Mrs. Feenstra's home, that the order directing the Civil Sheriff for the Parish of Orleans to seize and sell the home is still in effect and that the threat of losing her home is, accordingly, a real one. We conclude, therefore, that the controversy between Mrs. Feenstra and Mr. Kirchberg described in Mrs. Feenstra's second counterclaim is neither academic nor moot and that an actual controversy, as required by article III of the Constitution and the Federal Declaratory Judgment Act, exists here, rendering appropriate review by this court of the decision of the district court.

III

Our analysis must begin with a consideration of the nature of the matrimonial regime under Louisiana law.

Article 86 of the Louisiana Civil Code states that: "The law considers marriage in no other view than as a civil contract."[7] In order to enter into a marriage contract, the parties must be willing and able to contract;[8] they must freely consent;[9] and they must contract pursuant to the forms and solemnities prescribed by law.[10]

Insofar as the property of married persons is concerned, article 2334 of the Louisiana Civil Code divides such property into separate and common property. Under article 2334, common property is that which is acquired by the husband and wife during marriage in any manner different from that specified in article 2334 for the acquisition of separate property. However, under articles 2325, 2332 and 2424[11] of the Code, the parties entering into a marriage contract may, in that contract, modify, limit or entirely reject the regime established by article 2334. In the language of article 2332, "[t]he partnership, or community of aquets or gains, needs not to be stipulated;

7. La.Civ.Code Ann. art. 86 (West 1952).

8. *Id.* art. 90.

9. *Id.* art. 91.

10. La.Civ.Code Ann. art. 2328 (West 1971).

11. *Id.* arts. 2325, 2332, 2424.

it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist." [12]

The management of property that under article 2334 is common property is given by article 2404 of the Louisiana Civil Code to the husband:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Finally, article 2334, as it existed in 1974,[13] contained a restriction on the right of the husband, under article 2404, to alienate common property without the consent and permission of the wife:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the

12. We have assumed in deciding this appeal that the parties to a marriage in Louisiana could contractually retain a community property arrangement and merely substitute the wife for the husband as manager of the community. Of course, if article 2404 requires that the husband be the manager of any community, whether established by operation of law or by contract, our analysis of the constitutionality of the statute would not be affected.

13. *See* note 2, *supra*.

> wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

Because of the contractual nature of marriages generally under Louisiana law and because the parties to a marriage contract have the right to alter the community regime, the State of Louisiana argues that the parties to a marriage contract (such as Mr. and Mrs. Feenstra) in which no provision has been made to alter the community regime have freely and tacitly contracted *for* the community regime. The State further asserts that a wife (such as Mrs. Feenstra) who fails to file the declaration contemplated by the last paragraph of article 2334, and thereby to limit her husband's power to encumber or dispose of immovable property standing in the name of both husband and wife without her consent, has freely consented to any encumbrance or disposition of that property which he might make. These arguments convert Mrs. Feenstra's predicament from one which is statutorily imposed—and therefore within the reach of the fourteenth amendment—to one which has been freely chosen by Mrs. Feenstra—and therefore beyond the reach of the fourteenth amendment. The district court agreed:

Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.

The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisiana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Kirchberg v. Feenstra, 430 F.Supp. 642, 648 (E.D.La.1977).

[3–5] While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law—article 2404 of the Louisiana Civil Code—is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is made by the

government, the obligation to afford all persons the equal protection of the laws arises.[14]

14. *See Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975). *Cf. Trimble v. Gordon*, 430 U.S. 762, 775 n.16, 97 S.Ct. 1459, 1467 n.16, 52 L.Ed.2d 31 (1977). We reject the argument that the matrimonial regime that governs marriages in Louisiana absent an antenuptial agreement is the free choice of the parties to a marriage. First, as was said in *Trimble*, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Id.* Second, the *Trimble* Court also expressed doubt that, at least when the disadvantaged group has been a frequent target of discrimination, a state may constitutionally place on individual members of that group the burden of overcoming a statutory presumption about their intentions or about the intentions of others directly affecting them. Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. Finally, as we discuss in text below, even were all couples adequately informed before marriage about the statutory presumption and how to avoid it, the choice presented by the State of Louisiana is hardly an even-handed one. It is more expensive for a couple to provide the wife with some legally-

[6–8] Having established that a choice has been made for the Feenstras by Louisiana law, the next question for consideration is whether the nature of the choice—the designation of the husband as the manager of the community estate—is a classification by gender. It is clear that insofar as the management of the community estate is concerned, several different methods of management are possible. The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife acting jointly, or by either the husband or wife acting concurrently.[15] The State of Louisiana has chosen one—management by the husband alone—and in so doing has established a gender-based classification subject to scrutiny under the fourteenth amendment. The State urges that because a couple contemplating marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them and, accordingly,

enforceable right to participate in the fundamental family decisions about the disposition of community property than it is for them to leave all those decisions to the husband. The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

15. The Legislature of Louisiana has provided for 'concurrent management of community property in its recent revision of the law regulating matrimonial regimes. *See* note 1, *supra*.

no state-imposed gender-based classification.[16] This analysis, however, fails to take into account the fact that Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager, and it does not place that burden and expense on couples wishing to make the husband the manager. That it places the same burden on couples seeking other non-traditional forms of community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties

16. Discrimination need not amount to an absolute prohibition to be condemned by the fourteenth amendment. What the Constitution condemns is a statute providing for different treatment of similarly situated individuals based on gender when that discrimination among individuals is not substantially related to achieving an important governmental objective. *See* note 17, *infra*. The discrimination in this case is that the State establishes a burdensome requirement for couples wishing to give the wife a legally-enforceable right to participate in the management of the community property, whereas no such burden is placed on couples wishing to vest entire managerial control in the husband. We do not see how this burden can be avoided under Louisiana law. Even if it could be avoided, we think the Supreme Court has rejected the notion that an insurmountable barrier is necessary to render a legislative classification unconstitutional. *Trimble v. Gordon*, 430 U.S. 762, 773–74, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

to the marriage without transactional costs and wives cannot, the Louisiana law extends a benefit to men that is not extended to women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis.

[9–11] The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test: "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [17] Inher-

17. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The requirement of a substantial relationship between the classification by gender and the achievement of the important governmental objective necessarily involves an inquiry whether there are less discriminatory methods available to the state to achieve the same objective. *See Orr v. Orr*, 440 U.S. 268, 280–281, 99 S.Ct. 1102, 1112–1113, 59 L.Ed.2d 306, 320–21 (1979).

The role of gender as a basis for legislative classifications continues to be a significant issue in our society, and the Supreme Court has been faced with the issue many times in the past nine years. *See generally Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43

ent in this analysis is a balancing process by which a court weighs the state interest sought to be furthered against the character of the discrimination caused by the statutory classification. If the court concludes that the government interest is insufficient or the legislative classification is not substantially related to achieving that interest, the statute is an unconstitutional denial of equal protection under the fourteenth amendment.

[12, 13] Because the district court declined to apply equal protection analysis to article 2404 of the Louisiana Civil Code, we are unable to look to the district court's opinion for guidance on the specific governmental objective sought to be achieved by article 2404.[18] The State of Louisiana, hav-

L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). *Cf. Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (exclusion of pregnancy benefits from state insurance program not gender-based classification).

18. The district court relied on *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1970), for the proposition that equal protection analysis is inappropriate in an area in which a state has extensively and carefully regulated the conduct of its citizens with respect to rights and obligations that are peculiarly matters of state interest and concern. Seven years later, commenting on its deferential approach to the statute at issue in *Labine*,

ing devoted half of its brief to the argument that there is no case or controversy here, has given us only *one sentence* on the state objective to be achieved in article 2404: "One of the two spouses has to be designated as the manager of the community." If the State means that it has a valid governmental interest in providing in its marital or community property laws for the way in which community property is managed, then that is a position with which we could scarcely disagree. However, the State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, *i. e.*, the selec-

the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) said: "Despite [the differences between the Louisiana statute at issue in *Labine* and the Illinois statute at issue here], it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17, 97 S.Ct. at 1468 n.17. When a federal court is presented with a constitutional challenge to one aspect of a complex and comprehensive structure of state legislation, its responsibility is to focus as closely as possible upon the challenged provision, with due regard for preserving the soundness of the entire structure while removing any constitutionally infirm provisions; but if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall.

tion of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective. Since article 2404 clearly discriminates against women as community managers or co-managers, the State must show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such a showing. The decision of the Louisiana Legislature to adopt a law providing for a gender-neutral method of community management, effective January 1, 1980, while not dispositive of the issue before this court, suggests that such a showing would not be possible. Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion.[19]

19. Although Mrs. Feenstra brought her second counterclaim as a challenge to article 2334, the relevant portion of that statute, *see* note 2, *supra*, acted only to limit the husband's rights as head and master of the community property as provided in article 2404. Our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana, renders unnecessary a decision on the limiting portion of article 2334.

IV

[14] We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318–319, 84 L.Ed. 329 (1940). The concept of the husband as head and master of the community of gains has been a part of Louisiana law since 1808, Louisiana Civil Code of 1808, art. 66, and before that first codification of Louisiana law it was apparently part of the Spanish Civil Law effective in that region at the time of the Louisi-

ana Purchase, *see, e. g.*, Pugh, *The Spanish Community of Gains in 1803*: Sociedad De Gananciales, 30 La.L.Rev. 1, 13 (1969). Since our decision could produce substantial inequitable results if applied retroactively, we avoid that "injustice or hardship" through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

REVERSED.

APPENDIX B

Appended Orders of Court.

1) Kirchberg v. Feenstra: 430 F. Supp. 642 at page 648, 1977, E.D. La. "Accordingly, the motion of the State of Louisiana for summary judgment on the second counterclaim is GRANTED."

2) Kirchberg v. Feenstra v. Edwards, et al. Court of Appeals, Fifth Circuit, 609 F. 2d 727 (1979) cite at page 730, "We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the Fourteenth Amendment and we reverse. In so doing we apply our decision prospectively."

3) Kirchberg v. Feenstra v. Edwards, et al. Court of Appeals, Fifth Circuit, 609 F. 2d 727 (1979) cite at page 735, "Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion."

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

VS.

JOAN PAILLOT FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

VS.

EDWIN W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

NO. 77-1991

NOTICE OF APPEAL

TO THE HONORABLE JUDGES OF THE FIFTH CIRCUIT COURT OF APPEALS FOR THE UNITED STATES OF AMERICA:

Please take Notice that KARL J. KIRCHBERG does hereby appeal the decision rendered on December 12, 1979, and reported as:

KARL J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

VS.

JOAN PAILLOT FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

VS.

EDWIN W. EDWARDS AND STATE OF LOUISIANA, Third Party Defendants-Appellees.

NO; 77-1991

United States Court of Appeals, Fifth Circuit.

December 12, 1979.

and said appeal 609 F. 2d 727 (1979) is taken pursuant to TITLE 28 U.S.C.A. Section 1254.

RESPECTFULLY SUBMITTED:

/s/ Alan Ford Schoenberger

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CERTIFICATE OF SERVICE

I, ALAN FORD SCHOENBERGER, Counsel for Appellant, Karl J. Kirchberg, do affirm that on this 3rd day of March, 1980, I have served upon the following named parties by depositing same in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to counsel of record, the attached Notice of Appeal:

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Supreme Court, U. S.
FILED
JUN 27 1980
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APPENDIX

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG

Appellant,

--V.--

JOAN PAILLOT FEENSTRA

Appellee.

--V.--

EDWIN W. EDWARDS
and STATE OF LOUISIANA

ON APPEAL FROM THE

FIFTH CIRCUIT COURT OF

APPEALS FOR THE UNITED STATES

OF AMERICA

JURISDICTIONAL STATEMENT FILED MARCH 8, 1980
PROBABLE JURISDICTION NOTED APRIL 28, 1980

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1.
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Date	Nr.	Proceedings
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5-6-76	3	ANSWER of Feenstra
6-14-76	9	Pltfs. answer to counterclaim of Feenstra
6-17-76	10	3rd party defts. Edwards & State of La.'s mtn. for summ. jdgmnt; hrg. 7/7/76
6-23-76	10(a)	Pltfs. mtn. for summ. jdgmnt. on counterclaim; hrg. 7/7/76.
4-22-77	33	ORDER; Mtn of State of La. for summ. judgment on second counterclaim of Joan P. Feenstra, previously submitted, is hereby GRANTED. (MLS) 4/21/77; ent 4/25/77
5-9-77	35	NOTICE OF APPEAL of J. P. Feenstra from final order granting deft's in counterclaim mtn for summ judgment, signed 4/21/77
5-31-77	36	Deft's mtn & ORDER dismissing first counterclaim against pltf (MLS) 6/3/77; ent 6/6/77
6-27-77	37	Pltf's mtn. and ORDER to dismiss complt vs deft. (CSjr) 6/27/77; ent 6/28/77

7-6-77	38	JUDGMENT in favor of 3rd pty defts, Edwin Edwards & State of La. & against deft, Joan Paillot Feenstra, dismissing 3rd pty suit (CLERK NBJ) 7/6/77; 4/25/77, nunc pro tunc, on 7/6/77.
7-19-77	39	JUDGMENT (Corrected) in favor of 3rd pty defts, K. J. Kirchberg, E. W. Edwards & State of La. & against deft, Joan Paillot Feenstra, dismissing 3rd pty suit (CLERK-NBJ) 7/18/77; entered 4/25/77, nunc pro tunc, 7/19/77.

2

Petitions, Answers, Orders, Motions, Reply and Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J KIRCHBERG	*	CIVIL ACTION
VS.	*	NO.
JOAN PAILLOT FEENSTRA	*	SECTION:
* * * * * * * * * * * * * *	*	

PETITION FOR DECLARATORY JUDGMENT

The petition of Karl J. Kirchberg, a person of age and domiciled in Orleans Parish, State of Louisiana, respectfully represents that:

1.

Joan Paillot Feenstra is a person of the full age of majority and domiciled in the Parish of Orleans, State of Louisiana.

2.

This is an action for a declaratory judgment as authorized by Section 2201 of Title 28 of the United States Code, and is brought because there is an actual controversy now existing between the parties in the above numbered action, as to which the plaintiff seeks the judgment of this Honorable Court.

3.

The jurisdiction of this Court is based on a federal question, more particularly, Sections 1602 (f), and 1635 (a) of Title 15 of the United States code. Jurisdictional amount

is waived as per Section 1681 (p) of Title 15 of the United States Code.

4.

The nature of the controversy involving these statutes is as follows: On October 17, 1974 the defendant's husband, Harold C. Feenstra, gave the plaintiff a promissory note for Three thousand ($3,000.00) dollars. This note was secured by a mortgage on the defendant's property. The consideration for this note arose from a contract of employment whereby the defendant's husband secured the services of the plaintiff to defend him in a criminal action. The note was given as a retainer. Subsequently, the plaintiff successfully defended the defendant's husband. Plaintiff avers that the retainer was thus earned.

5.

Plaintiff avers that at no time was he ever in the business of extending credit. Further, he only accepted the note instead of

cash in view of the circumstances of this particular case, to wit: The defendant's husband did not have any other means of securing his services.

6.

Since October 22, 1974, the defendant's husband has paid only $984.72 on the said note. Plaintiff placed the defendant's husband in default and then filed a petition in Civil District Court of Orleans Parish seeking to foreclose on the mortgage via executiva. A copy of that petition is attached hereto for reference.

7.

The particular federal statutes previously enumerated come into this controversy because the attorney for the defendant, Joan Paillot Feenstra, has alleged that the mortgage is invalid under the terms of Section 1635 (a) of Title 15 of the United States Code, since the plaintiff, Karl J. Kirchberg,

failed to give proper disclosure under that section of the code. Plaintiff contends that he is not a creditor under the definition of Section 1602 (f) of Title 15 of the United States Code, and as such, is not within the provisions of that section of the code. Further, plaintiff seeks a declaratory judgment as to his status since the provisions of Sections 1640 (a) and 1611 of Title 15 of the United States Code provide for stringent penalties for violations of that section.

WHEREFORE, plaintiff prays that a copy of these proceedings be served upon the defendant, and that the following relief be afforded him;

1. That this Court find and decree that the plaintiff is not a creditor within the definition of Section 1602 (f) of Title 15 of the United States Code.

2. That this Court find and decree that

the plaintiff is not a creditor within the definition of Section 1602 (f) of Title 15 of the United States Code.

2. That this Court find and decree that since the plaintiff is not within the jurisdiction of Title 15 of the Code, he is not liable for any civil or criminal sanctions for failing to give the proper disclosure.

3. That this Court issue a declaratory judgment settling the issues presented by Title 15 of the United States Code, and

4. That the defendant, Joan Paillot Feenstra, be charged with all costs of this litigation.

William R. Brough
Attorney for Plaintiff
315 Richards Building
New Orleans, Louisiana
70112
522-8706

Please Serve:

Joan Paillot Feenstra
Campsite, Irish Bayou, New Orleans, Louisiana

Barbara Hausman-Smith
Attorney for Joan Paillot Feenstra
New Orleans Legal Assistance Corporation
226 Carondelet Street
New Orleans, Louisiana 70130

CIVIL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. DIVISION " " DOCKET NO.

KARL J. KIRCHBERG

versus

JOAN PAILLOT, widow of first marriage to TWEED KELLER MARSH, wife of/and HAROLD C. FEENSTRA

Filed: _____ _____
Deputy Clerk

PETITION FOR MORTGAGE FORECLOSURE, BY EXECUTORY PROCESS

The petition of Karl J. Kirchberg, domiciled in the State of Louisiana, Parish of Orleans, respectfully represents, that:

1.

Joan Paillot Feenstra and Harold C. Feenstra, both of age, are referred to herein

as debtors. The whereabouts of Harold Feenstra are unknown. Therefore an attorney at law should be appointed to represent him in these proceedings.

2.

Plaintiff is the holder in due course of one certain promissory note, executed by the debtor, to the order of Karl J. Kirchberg, and by him endorsed in the principal sum of three thousand and no/100 ($3,000.00) Dollars, payable on demand after date of the note. This original note, which is referred to as the mortgage note, is attached as an exhibit. This note further provides that 30% additional will be paid as attorney's fees. The note also provides for interest thereon at the rate of 8% per annum from date of demand.

3.

The mortgage note was paraphed "Ne Varietur" by E. Howard McCaleb, III, Notary

Public, on the 22nd day of October, 1974, to identify it with an Act of Mortgage (referred to as the Act of Mortgage), executed on the same day by the maker of the mortgage note, in favor of the payee of the mortgage note in the same sum as the mortgage note, to secure the payment of the mortgage note, mortgaging the hereinafter described property.

4.

The Act of Mortgage was duly recorded in the Mortgage Records of Orleans Parish, Louisiana, under Entry No. 143760 of that Parish. A certified copy of this Act of Mortgage is attached as an exhibit.

5.

The property mortgaged in the act of mortgage is described as follows:

> A CERTAIN LOT OF GROUND, in the THIRD DISTRICT, fauboug De Montlouzin, in Section known as Irish Bayou Subdivision lot #7 Section 8, accordingly #7 commences at a point on the westerly sideline of Lake Pontchartrain Bridge

approach road. Site 300 feet measured in a southerly direction along the sidelines of the said approach road from the northeast corner of Section 8 of Irish Bayou Subdivision. And measuring 50 feet front to a sideline of said lot and having a direction of North 83° and 4 minutes and 8 lines East.

The sale does not include the mineral rights to the property.

With all of the improvements thereon.

Being the same property purchased from Mr. & Mrs. August J. Ciccio by Joan Paillot, widow of first marriage to Tweed Keller Marsh, wife of and Harold C. Feenstra before Joseph H. Hurendon, Notary Public on February 9, 1966, and recorded in the Parish of Orleans in the Conveyance Office thereof in COB 673 folio 334 on February 11, 1966.

6.

The mortgage note is subject to credits paid on the principal, leaving an unpaid balance due on it in the sum of two thousand fifteen and 28/100 ($2,015.28) dollars.

7.

The Act of Mortgage and Mortgage Note provide that if there is a default in the payment of any installment, the entire principal sum, interest, advances for the care and preservation of the property, and attorney's fees shall at once become due at the option of the holder of the mortgage note without notice.

8.

The note was not paid aft er demand and having not been paid, and, in accordance with the terms of the mortgage note, petitioner has exercised and does hereby exercise its option to declare the entire principal sum, interest, advances for the care and preservation of the property, and attorney's fees due and payable. The defendant is therefore indebted to petitioner in the full sum of two thousand fifteen and 28/100 ($2,015.28) dollars, with 8% per annum interest thereon

from February 11, 1976 until paid, plus 30% additional on both principal and interest as attorney's fees.

9.

This amount is past due and remains unpaid despite amicable demand.

10.

The act of mortgage is evidence by an authentic act importing a confession of judgment for the entire amount due petitioner as set forth above.

11.

Appraisal was waived in the Act of Mortgage; plaintiff desires to have the mortgaged property sold without appraisal.

12.

Under the provisions of Louisiana Revised Statutes 13:4359, petitioner demands that 100% of the purchase price shall be paid in cash at the moment of adjudication.

WHEREFORE, the annexed exhibits considered,

petitioner respectfully prays that:

I.

The Court order the issuance of a writ of seizure and sale directed to the Sheriff of Orleans Parish, Louisiana commanding him, after the Clerk has demanded payment from the defendant, duly appointed attorney, to seize the mortgaged property described in the petition, and to sell it in accordance with all of the requirements of law, at public auction, for 100% cash to be paid at the moment of adjudication, without appraisal, to the highest bidder.

II.

Out of the proceeds of this sale petitioner be paid by preference and priority over all other persons and creditors whomsoever, the full amount herein claimed, as follows:

1. Balance due on principal of mortgage note . . . $2,015.28

2. 8% per annum interest thereon from February 11, 1976, until paid . . . To be computed

3. Attorney's fees - 30% of principal and interest . .To be computed

4. All costs

III.

Petitioner prays that an attorney at law be duly appointed to represent the defendant herein, Harold C. Feenstra; that a copy of these proceedings be duly served on said attorney and Joan Paillot Feenstra, and that after due proceedings had, there be judgment rendered in favor of petitioner as prayed for.

William R. Brough
Attorney for Petitioner
315 Richards Building
New Orleans, Louisiana 70112
522-8706

A F F I D A V I T

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, PERSONALLY CAME AND APPEARED:

WILLIAM R. BROUGH,

who, being first duly sworn, did depose that:

He is the attorney for plaintiff in the above and foregoing petition, and, as such, duly authorized to execute this affidavit; that he has read the petition, and that all the allegations of fact contained in it are true and correct, and that the obligation due plaintiff has matured by virtue of the facts set forth in the petition.

WILLIAM R. BROUGH

SWORN TO AND SUBSCRIBED
BEFORE ME THIS ____ DAY
OF _____, 1976.

NOTARY PUBLIC

O R D E R

The foregoing petition, annexed documents, and the premises considered:

LET a three day notice to pay be issued herein, and if the debtors fail to pay the indebtedness within said period, let a writ

of seizure and sale issue herein commanding the Sheriff to seize and sell the property affected by the mortgage, as prayed for and according to law.

New Orleans, Louisiana.

_____, 1976

_____
J U D G E

O R D E R

LET _____,
Esquire, an attorney at law, be, and he is hereby appointed to represent defendant, Harold Feenstra, in these proceedings.

New Orleans, Louisiana

_____, 1976

_____
J U D G E

SERVE:

Defendant, through
Curator-Ad-Hoc Attorney

and

Joan Paillot Feenstra
Highway 11
Irish Bayou, La.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J.KIRCHBERG	*	CIVIL ACTION
	*	
VS.	*	NO. 76-842
	*	
JOAN PAILLOT FEENSTRA	*	SECTION: G(C)
* * * * * * * * * * * * * * *	*	CLASS ACTION

ANSWER

NOW INTO COURT, through undersigned counsel comes defendant, Joan Paillot Feenstra, who respectfully for answer to plaintiff's complaint alleges:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The court lacks jurisdiction over the subject matter of plaintiff's complaint.

THIRD DEFENSE

The plaintiff's complaint does not meet the jurisdictional prerequisites of this Court.

AND NOW, to answer each and every one of the allegations in plaintiff's complaint, defendant avers:

I.

Defendant admits the allegation of fact found in paragraph 1 of plaintiff's complaint.

II.

Defendant denies the allegations of fact contained in paragraphs 2 through 7 of plaintiffs complaint.

Now, as counterclaims, pursuant to Rule 13 (a) of the F.R.C.P., defendant alleges the following:

FIRST COUNTERCLAIM

JURISDICTION

1. This action for recission arises under the Truth-in-Lending Act, 15 U.S.C. §§1601 et seq. Jurisdiction is vested in this Court

pursuant to 15 U.S.C. §§1635 and 1640(e) and 28 U.S.C. 1337.

PARTIES

2. The First Counterclaim is brought by defendant, Joan Paillot Feenstra, a natural person of full age of majority, and a citizen of the United States and the State of Louisiana.

3. The First Counterclaim is brought against the plaintiff, Karl J. Kirchberg, a person of full age and majority, residing and domiciled in New Orleans, Louisiana. Plaintiff is an attorney licensed to practice law in the State of Louisiana. Plaintiff is a creditor under 15 U.S.C. 1602 (f) who regularly extends, or arranges for the extension of credit for which the payment of a finance charge is required.

STATEMENT OF FACTS

4. On October 17, 1974 Harold C. Feenstra, husband of defendant, signed a promissory note to the order of plaintiff, on demand

for $3,000.00 with interest at the rate of 8% per annum, and providing for 30% attorney's fees if not paid when due. This note evidenced an obligation for future personal legal services to be provided to Harold C. Feenstra.

5. On October 22, 1974, Harold C. Feenstra executed an Act of Mortgage on real property owned by the community and located in the Irish Bayou subdivision, Lot #7, Section 8, New Orleans, Louisiana. This Act of Mortgage was made in favor of plaintiff and reiterated a debt of $3,000.00.

6. Plaintiff creditor failed to make any disclosures to maker, Harold C. Feenstra or to his wife, the defendant, as required under the Truth-in-Lending Act and Regulation Z, 12 C.F.R. Part 226.9 et seq.

7. Defendant sent a letter via certified mail which was received by plaintiff on March 4, 1976, whereby defendant notified plaintiff

of her intention to rescind the mortgage transaction and offering to return plaintiff to his financial status quo prior to the Act of mortgage. (Attachment No. 1).

8. Since the recission letter was tendered, plaintiff has not cancelled the mortgage upon defendant's property, nor has he returned any money paid upon the obligation.

First Claim for Relief

9. The act of Plaintiff Karl J. Kirchberg in failing to make the proper disclosures to defendant under the Truth-in-Lending Act and Regulation Z, renders said plaintiff liable to defendant for (a) cancellation of the mortgage which plaintiff now holds on defendant's property, (b) return of any payments made on the note and (c) reasonable attorneys fees and costs.

SECOND COUNTERCLAIM

JURISDICTION

10. Defendant's counterclaim for declarator

relief arises under the Fourteenth Amendment to the United States Constitution. The amount in controversy exceeds the sum of $10,000.00 excluding interest and costs. This Court has jurisdiction of the counterclaim under 28 U.S.C. #1331.

PARTIES

11. Defendant institutes this counterclaim for declaratory relief on behalf of herself and, pursuant Rule 33 (b) (2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated. Defendant seeks relief on behalf of a class composed of all married women in the State of Louisiana who have acquired immovable community property during the course of their current marriages and who have not filed declaration by authentic act that their consent is necessary for a lease, sale or mortgage of such property under Article 2334 of the Civil Code of Louisiana. By its very definition the

class is so numerous that joinder of all members is impracticable. There are questions of law common to the class. The claims of the defendant are typical of the claims of the class. The defendant will fairly and adequately protect the interests of the class. The plaintiff in this action has acted on grounds generally applicable to the class, thereby making appropriate declaratory relief with respect to the class as a whole.

12. The second counterclaim is brought against the following:

a) Karl J. Kirchberg (see No. 3)

b) The Honorable Edwin W. Edwards, Governor of the State of Louisiana, who pursuant to LSA-Constitution, Article 4, §5 is charged with the duty to execute the laws of the State of Louisiana;

c) The State of Louisiana.

STATEMENT OF FACTS

13. As previously alleged in paragraph 4 of plaintiff's complaint, defendant's husband Harold C. Feenstra, during the course of their marriage, gave the plaintiff a promissory note for $3,000.00 as pre-payment for personal legal services. Harold C. Feenstra required representation for criminal charges brought against him by the Orleans Parish District Attorney for child molestation of his nine year old daughter. The note was secured by a mortgage on the home of Harold Feenstra and the defendant, which was community property under Louisiana law, having been acquired during the course of their marriage. Plaintiff subsequently recorded that mortgage in the Mortgage and Conveyance Office for Orleans Parish.

14. Defendant was not informed, nor was she given any notice whatsoever, of the execution or recordation of the mortgage on her home.

15. At the time the home was acquired defendant did not know that her husband could sell, lease, or mortgage the home without her consent unless she filed a declaration under Article 2334 of the Louisiana Civil Code. Defendant was ignorant of the terms of that codal provision which allows a husband to lease, mortgage, or sell immovable community property without the authority or consent of his wife unless a declaration stating that her authority or consent are required has been executed and filed in the Mortgage and Conveyance Record Office of the Parish in which the property is situated. In this respect, defendant was and is typical of thousands of married women throughout the State of Louisiana who have acquired community property in the course of their marriages and who have not executed a declaration under Article 2334.

16. Defendant did not become aware of the fact that her home was mortgaged until May,

1975 when plaintiff informed her on the phone of this existence of said mortgage and threatened to foreclose on his mortgage.

17. On information and belief, defendant alleges that her difficulties resulting from the unauthorized mortgage of her home are typical of those suffered by married women in Louisiana whose husbands have exercised their rights under Art. 2334 and have either mortgaged, sole or leased immovable community property without their wives' consent.

CAUSE OF ACTION

18. That provision of Art. 2334 of the Louisiana Civil Code which allows a husband to lease, sell or mortgage immovable community property without the consent of his wife unless she has made a specific declaration that her consent is required is unconstitutional on its face under the Fourteenth Amendment to the United States Constitution in that it deprives plaintiff and the class of married

women she represents to equal protection under the laws and to due process of law.

19. The execution of mortgage of plaintiff's property without her consent as provided for and allowed by Art. 2334 of the Louisiana Civil Code, constituted a violation of her rights to equal protection and due process of law under the Fourteenth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

WHEREFORE, defendant, counterclaimant, prays that she and the class she represents be granted the following relief by this Court:

20. That this Court determine, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, that this counterclaim is an appropriate class action and that the defendant in this case may represent the class as defined in Paragraph 11 of this Counterclaim;

21. That this Court issue a declaratory judgment under 28 U.S.C. 2801, et seq., that the provision of Art. 2334 of the Louisiana

Civil Code which allows the alienation of immovable community property by a husband without his wife's consent unless she has made a declaration that her consent is required, is unconstitutional as being in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

22. That this court issue a declaratory judgment that the mortgage executed on defendant's home by her husband, Harold Feenstra, is void as having been executed and recorded without her consent pursuant to an unconstitutional state statute.

23. That this Court dismiss plaintiff's suit at his own cost, denying him the relief requested therein.

24. That this Court award plaintiff and the Class she represents such other relief as they may be entitled to.

Respectfully submitted,

New Orleans Legal
Assistance Corporation
605 Carondelet Building
New Orleans, Louisiana
70130
Telephone: 529-7551

BY: _____
BARBARA HAUSMAN-SMITH

OF COUNSEL:
George M. Strickler, Jr.
344 Camp Street
New Orleans, Louisiana
70130
504-581-2688

Jack Mark Stolier
New Orleans Legal
Assistance Corp.
605 Carondelet Building
New Orleans, Louisiana
70130
Telephone: 529-7551

PLEASE SERVE:

Karl J. Kirchberg
13344 Chef Menteur Highway
New Orleans, Louisiana

Governor Edwin W. Edwards
Governor's Office
Baton Rouge, Louisiana

State of Louisiana through the
Secretary of State, Wade O. Martin
Baton Rouge, Louisiana

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J.KIRCHBERG	*	CIVIL ACTION
VS.	*	NO. 76-842
	*	SECTION G
JOAN PAILLOT FEENSTRA	*	

* * * * * * * * * * * * * * * *

REPLY

Now into Court, through undersigned counsel comes plaintiff, Karl J. Kirchberg, defendant in counterclaim, who respectfully for reply to said counterclaim alleges:

First Defense

The Counterclaim fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of defendant's counterclaim.

Third Defense

The defendant's complaint does not meet the jurisdictional prerequisites of this Court.

And Now, to reply to each allegation of defendant's counterclaim, plaintiff avers:

I.

Plaintiff denies the allegations of paragraph 1 of the counterclaim.

II.

Plaintiff admits the allegations of paragraph 2, of the counterclaim.

III.

Plaintiff denies the allegations of paragraph 3 of the counterclaim, excepting that he admits his domicile and that he is a practicing attorney.

IV.

Plaintiff denies the allegations of paragraph 4 of the counterclaim excepting that he admits that Harold C. Feenstra executed a note in his favor.

V.

Plaintiff admits the allegations of paragraph 5 of the counterclaim.

VI.

Plaintiff denies the allegations of

paragraph 6-24 of the counterclaim.

WHEREFORE, plaintiff prays that his reply be deemed good and sufficient, and that, after due proceedings had, there be dismissal of defendant's counterclaim, at defendant's costs.

William R. Brough
Attorney for Karl J. Kirchberg
315 Richards Building
New Orleans, Louisiana 70112
522-8706

C E R T I F I C A T E

I certify that a copy of the foregoing pleadings has been served upon counsel for all parties by mailing the same to each properly addressed and postage prepaid this ____ day of _____, 1976.

WILLIAM R. BROUGH

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	CIVIL ACTION NO. 76-842
VERSUS	SECTION G
JOAN FEENSTRA	CLASS ACTION

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, the Honorable Edwin W. Edwards, Governor of the State of Louisiana, and the State of Louisiana, as Third Party Defendants to the Second Counterclaim, move for a summary judgment against the counterclaimant on the ground that the pleadings and admissions on file show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.

Wherefore, your movers pray that this motion for summary judgment be granted.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
First Assistant Attorney General

LOUIS M. JONES
Assistant Attorney General

JANICE GONZALES
Staff Attorney

State of Louisiana
234 Loyola Avenue - 7th Floor
New Orleans, Louisiana 70112
(504) 527-8371

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	⁂	CIVIL ACTION
VERSUS	⁂	NO. 76-842
JOAN PAILLOT FEENSTRA	⁂	SECTION "G" (C)

* * * * * * * * * * * * * * * *

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, Karl J. Kirchberg, as defendant to the Counterclaims, moves for a summary judgment against the counterclaimant

on the ground that the pleadings and admissions on file show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.

WHEREFORE, your mover prays that this motion for summary judgment be granted.

William R. Brough
Attorney for Mover
315 Richards Building
New Orleans, Louisiana
70112

522-8706

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	*	CIVIL ACTION
VERSUS	*	NO. 76-842
JOAN PAILLOT FEENSTRA, ET AL	*	SECTION 6

* * * * * * * * * * * * * * * * * * *

NOTICE OF APPEAL TO THE
FIFTH CIRCUIT COURT OF APPEALS

Notice is hereby given that Joan Paillot Feenstra, defendant and plaintiff in counterclaim, hereby appeals to the Fifth Circuit

Court of Appeals from the final order granting defendant's in counterclaim motion for summary judgment, signed on April 21, 1977.

BARBARA HAUSMAN-SMITH
Attorney for defendant/
plaintiff in counterclaim
New Orleans Legal Assistance
Corporation
605 Carondelet Building
New Orleans, Louisiana 70130
529-7551

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	*	CIVIL ACTION
VERSUS	*	NO. 76-842
JOAN PAILLOT FEENSTRA	*	SECTION G

* * * * * * * * * * * * * * *

MOTION TO DISMISS

Joan Paillot Feenstra, the defendant herein, has filed her First Counterclaim against Karl J. Kirchberg, the plaintiff; and she moves this Honorable Court to dismiss her first counterclaim with prejudice on the grounds that she no longer wishes to pursue

this cause of action.

BARBARA HAUSMAN-SMITH
Attorney for Defendant
New Orleans Legal Services Corp.
605 Carondelet Building
New Orleans, Louisiana 70130
529-7551

ORDER

In light of the foregoing

IT IS ORDERED that the defendant, Joan Paillot Feenstra, be allowed to dismiss the First Counterclaim against Karl J. Kirchberg, with prejudice.

This _____ day of _____, 1977.

DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	*	CIVIL ACTION
	*	
VERSUS	*	NO. 76-842
	*	
JOAN PAILLOT FEENSTRA	*	SECTION "G"

* * * * * * * * * * * * * *

MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, comes plaintiff and defendant in counterclaim, Karl J. Kirchberg who moves this Honorable Court to dismiss his complaint against defendant Joan Paillot Feenstra.

William R. Brough
Attorney for Plaintiff
315 Richards Building
New Orleans, Louisiana
70112

522-8706

O R D E R

Considering the foregoing,

IT IS ORDERED that plaintiff, Karl J. Kirchberg's complaint against defendant, Joan Paillot Fennstra, be dismissed.

This _____ day of June, 1977.

United States
District Judge

Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	CIVIL ACTION
VERSUS	NO. 76-842
JOAN PAILLOT FEENSTRA	SECTION "G"

J U D G M E N T

The Court having, on April 22, 1977, granted the motion of Edwin W. Edwards and State of Louisiana, for summary judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third-party defendants, Edwin W. Edwards and State of Louisiana, and against defendant, Joan Paillot Feenstra, dismissing said defendant's third-party suit.

New Orleans, Louisiana, this _____ day of July, 1977.

CLERK, U.S.District Court

ENTERED APRIL 25, 1977, nunc pro tunc, ON JULY 5, 1977.

4

Corrected Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG	CIVIL ACTION
VS	NO. 76-842
JOAN PAILLOT FEENSTRA	SECTION "G"

C O R R E C T E D J U D G M E N T

The Court having on April 22, 1977, granted the motion of third party defendants, Edwin W. Edwards and State of Louisiana and Karl J. Kirschberg, for summary judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third party defendants, Karl J. Kirchberg, Edwin W. Edwards and State of Louisiana, and against defendant, Joan Paillot Feenstra, dismissing said defendant's third-party suit.

Dated at New Orleans, Louisiana, this _____ day of July, 1977.

NELSON B. JONES, CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

ENTERED April 25, 1977, nunc pro tunc, on July 19, 1977.

5

Court Opinions*

The relevant Court Opinions are printed in the Statement of Jurisdiction, Pages A-1 through A-84.

6

Appended Orders of Court*

The relevant Appended Orders of Court are printed in the Statement of Jurisdiction, Page A-85.

7

Deleted Textual Materials*

Date	Nr.	Proceedings
3-26-76	2	M.R. on S & C served Barbara Hausman Smith on 3-23-76 and Joan Paillot Feenstra on 3-24-76
5-6-76	4	Defts. mtn. & ORDER allowing action in forma pauperis. (ABR) 5/10/76. Ent. 5/11/76.
5-6-76	5	Deft. Feenstra's mtn. & ORDER allowing Edwin Edwards & State of Louisiana as defts. in counterclaim, summs. to be served on them. (ABR) 5/10/76 Ent. 5/12/76.
5-17-76	6	M.R.'s on answer, motion & ORDERs to: State of La., served thru Mr. Woods, Asst. Sect. of State, 5/11/76; to Gov. Edwin Edwards, served thru Dianne Nabby 5/11/76; to Karl Kirchberg, served personally 5/10/76.

5-19-76	7	M.R. on summs. to: Edwin Edwards, served thru Mike Baer 5/17/76.
5-14-76	5-a	ORDER(FJRH) 5/12/76-All "G" cases temporarily re-allotted to other sections are now returned to Section "G".
5-24-76	8	M.R. on 3rd prty complt. to State of La., served thru C.C. Wood 5/19/76.
6-29-76	11	Deft's interrogs to pltf.
6-25-76	10(b)	Joint Mtn. & ORDER to CONTINUE hrg. of 3rd prty defts. mtn. for summ. jdgmnt. from 7/7/76 to 8/4/76. (MLS) 6/28/76. Ent. 6/30/76.
6-30-76	12	Joint Motion & ORDER that Plft's Motion for Summary Judg is cont to 8-4-76. (MLS) 7-2-76 ent 7-2-76.
7-13-76	13	Pltfs. ans. to defts. 1st interrogs.

7-19-76	14	Notice of Prel. Conference on 12/7/76 at 4:30 P.M., before Mag. Carriere. Ent. 7/22/76
7-30-76	15	Defts. opposition to pltfs. mtn. for summ. jdgmnt.
8-2-76	16	Mtn. of Deft., and pltf. to continue hrg. on mtn for Summary Judgment & ORDERED cont'd to 9-1-76 (MLS) 8-3-76 ent 8-4-76.
8-3-76	17	Joint Mtn. to Continue Hearing on Summary Judgment & ORDERED cont'd to 9-1-76 (MLS) ent. 8-4-76.
8-4-76	18	Mrg. of 3rd prty defts. Edwards & State of La.'s mtn. for summ. jdgmnt: CONTINUED to 8/17/76. Mrg. of deft. Kirchberg's mtn. for summ. jdgmnt; DENIED. (MLS) Ent. 8/5/76.
8-6-76	19	Deft. Feenstra's mtn. to certify class; hrg. 9/1/76.

8-20-76	20	3rd prty Deft. State of La. & Edwards' 1st supplemental memo in support of mtn. for summ. jdgmnt.
8-27-76	21	Defts. opposition to mtn. for summ. jdgmnt.
8-31-76	22	Affidavit of Carol Telford & Jeanne Keller in support of mtn. to cert. class.
8-31-76	23	Defts. interrogs. to pltf.
9-1-76	24	Pltfs. memo in support of mtn. for summ. jdgmnt.
9-1-76	25	Pltfs. 1st supplemental memo in support of mtn. for summ. jdgmnt.
9-1-76	26	Mrg. of pltfs. mtn. for summ. jdgmnt. on counterclaim & deft. Feenstra's mtn. to certify class: SUBMITTED; counsel to file supplemental memos w/in 10 days. (MLS) Ent. 9/2/76.

9-10-76	27	Supplemental Memorandum in support of mtn for summary judgment. by 3rd pty deft. State of Louisiana.
9-16-76	28	Deft. Feenstra's supplemental memorandum.
9-27-76	29	Pltf Kirchberg's ans. to defts. interrogs.
9-30-76	30	3rd party deft memo. opposing the affidavit in support of mtn. to certify the class.
10-26-76	31	M.E.: Court invites representatives from La. Law Inst., La. Bar Assn, Tulane U Sch. of Law, La. State U. Sch of Law, Sou. U School of Law & Loyola U. Sch. of Law to file amicus cuiae memoranda on the issue not later than 11/30/76 (MLS) 10/22/76 ent 10/26/76.
12-9-76	32	M.E.: Prel. conf. was held 12-7-76; final pre-trial conf.

		will be held 6-1-77 at 9:30 am; TRIAL will commence 6-16-77 at 10 am without a jury. (Mag. Carriere) 12/7/76; ent. 12/10/76.
5-3-77	34	Deft. Feenstra's mtn & ORDER that deft may proceed on APPEAL in forma pauperis (MLS) 5/9/77; ent 5/10/77.
6-17-77	xx	RECORD FORWARDED TO COURT OF APPEALS (lmh)
6-30-77	xx	SUPPL. RECORD FORWARDED TO COURT OF APPEALS (lmh)
7-12-77	xx	SUPPL. RECORD FORWARDED TO COURT OF APPEALS (lmh)
7-19-77	xx	SUPPL. RECORD FORWARDED TO COURT OF APPEALS (lmh)
1-4-80	40	JUDGMENT FROM 5th CIRCUIT - ORDERED that the judgment of the District Court is hereby REVERSED. (GOLDBERG,TUTTLE,

AND RANDALL) 12-12-79 ENT. 1-4-80.

R E O P E N E D

10-14-77	41	ORDERED that this case is allotted to Mag. KCH. (FJRH) 10-14-77 ENT. 1-14-80
1-16-80	42	Issg. notice of prel conf. before Mag. KCH 4-14-80 at 3:45 P.M. (MLS) ENT. 1-17-80.
1-29-80	X	Record returned from Court of Appeals.
4-18-80	43	(M.E. 4-14-80) (MAG. KCH) Conf. held, cont. to 9-29-80 at 1:30 P.M. ENT. 4-21-80.

8

Financial Statement of Costs of Printing Appendix

I, BEN WRZESNICK,

the manager of Instee Printing Copy Center.

do certify that the cost of printing this appendix is $251.27.

9

Certificate of Service

I, Karl J. Kirchberg, appearing as appellant in proper person, and I, Alan Ford Schoenberger, appearing as Attorney Pro Hoc Vice, do affirm on this 26th day of June, 1980, that we have served upon the following named parties by depositing (3) three copies of this Appendix in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to the following counsel of record on this aforementioned date:

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JUN 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM,

NO. 79-1388

KARL J. KIRCHBERG,

Appellant

versus

JOAN PAILLOT FEENSTRA,

Appellee

versus

EDWIN W. EDWARDS and STATE OF LOUISIANA

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

MOTIONS ON BEHALF OF APPELLEES EDWIN W. EDWARDS AND THE STATE OF LOUISIANA SUGGESTING THAT THE CAUSE IS MOOT AND A MOTION TO DISMISS

WILLIAM J. GUSTE, JR.
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Assistant Attorney General
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MOTIONS ON BEHALF OF APPELLEES EDWIN W. EDWARDS AND THE STATE OF LOUISIANA SUGGESTING THAT THE CAUSE IS MOOT AND A MOTION TO DISMISS

Pursuant to Rule 16 and Rule 41(5) of the Rules of this Court, through the undersigned Assistant Attorney General of the State of Louisiana, appellees Edwin W. Ed-

wards and the State of Louisiana move this Honorable Court to dismiss the appeal in the above entitled and numbered cause of action for the following reason, to wit: Article 2404 of the Louisiana Civil Code, the constitutionality of which is at issue in this Court, has been repealed by the Louisiana Legislature by Act 709 of 1979, thereby rendering appellant's claim moot.

STATEMENT OF THE CASE

The relief requested by appellant is that this Court reverse the decision of the Fifth Circuit Court of Appeals and declare that Article 2404 of the Louisiana Civil Code is constitutional according to the Fourteenth Amendment of the United States Constitution, or, in the alternative, to find that the decision of the Fifth Circuit Court of Appeals should be applied prospectively only, and not to appellant, Karl J. Kirchberg.

Karl J. Kirchberg filed suit in Louisiana state court to foreclose on a mortgage he held on the home of appellee Joan P. Feenstra. The mortgage was executed by Mrs. Feenstra's husband. Mrs. Feenstra opposed the foreclosure arguing that Kirchberg violated the Truth in Lending Act, 15 U.S.C. Sec. 1601, *et seq.* Kirchberg then sued for declaratory judgment in United States District Court that he had not violated the Act. Mrs. Feenstra counterclaimed that the mortgage was invalid because appellant violated the Truth in Lending Act and because the Louisiana law, which permitted the mortgage with only the husband's signature, violated the equal protection and due process clauses of the Fourteenth Amendment. The State of Louisiana was made a third party defendant in Mrs. Feenstra's counterclaim of unconstitutionality.

The United States District Court for the Eastern District of Louisiana granted the State's motion for summary judgment. 430 F.Supp. 642.

Mrs. Feenstra appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals found that Louisiana Civil Code Article 2404 violated the equal protection clause of the Fourteenth Amendment, and reversed. 609 F.2d 727.

Kirchberg appealed the decision of the Court of Appeals to this Court.

After the District Court judgment but before the Court of Appeals' decision, Article 2404 of the Louisiana Civil Code was repealed by the Louisiana Legislature by Act 709 of 1979. By Act 709, the Legislature enacted a complete revision of Louisiana's community property system and repealed all Louisiana laws inconsistent with the new community property regime, including all of Louisiana Civil Code Title VI, "OF THE MARRIAGE CONTRACT, AND OF THE RESPECTIVE RIGHTS OF THE PARTIES IN RELATION TO THEIR PROPERTY."

The new system became effective January 1, 1980. It rejects the "head and master" management concept that formerly was the basis of Louisiana's community property system.

The new system is based on the principle of "equal management", as mandated by Senate Concurrent Resolution No. 54 of 1977. That resolution declared "adoption in principle of 'equal management' of community property by

each spouse; to authorize and request the Senate Committee on Judiciary, Section "A" and the House Committee on Civil Law and Procedure to create a joint subcommittee to draft proposed bills necessary to implement that concept and to create an advisory committee to assist the joint subcommittee." The resolution further resolved "that the proposed bill, in order to accomplish the purposes of this Resolution, shall include a provision to the effect that each spouse shall have the right to manage, control, and dispose of community property, except where specifically provided otherwise in the proposed bill."

ARGUMENTS OF LAW

MOOTNESS

Determining what kind of events will moot a suit on appeal has been a longstanding and complex problem. *See* generally, Note, Harv. L. Rev. 1672 (1970) and Monaghan. *Constitutional Adjudication: The Who and When,* 82 Yale L. J. 1363, 1383 (1973).

The general rule governing federal appellate or certiorari review is that "an actual controversy must exist at . . . these stages . . . and not simply at the date the action is initiated.". *Roe v. Wade,* 410 U.S. 113, 125 (1973); *Ellis v. Dyson,* 421 U.S. 426 (1975); *United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950). Exceptions are considered in rare circumstances where the case presents a question that is "capable of repetition, yet evading review", *Roe v. Wade,* 410 U.S. 113, 125.

This Court has been less willing to entertain cases

brought against governmental entities than where the actions sought to be enjoined are done by private persons and where the risk of recurrence of voluntarily ceased activities remains real. *United States v. W. T. Grant,* 345 U.S. 629 (1953); *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199 (1968).

This Court refused to consider an appeal in which appellant's anticipation of a recurrence of the dispute "affords no basis for the suggestion that the case . . . present(s) any possible subject for judicial action". *Commercial Cable Co. v. Burleson,* 250 U.S. 360, 362 (1919).

Such anticipations are "merely speculative". *Street Employees Div. 1287 v. Missouri,* 374 U.S. 74, 78 (1963).

Appellant's request should likewise be denied. Louisiana Civil Code Article 2404, which appellant seeks to have declared constitutional by this Honorable Court, was repealed by Act 709 of 1979 by the Louisiana Legislature. The repeal became effective January 1, 1980.

Dealing with a similar instance in *Roth v. Delano,* 338 U.S. 226, 231 (1949), this Court stated:

> ". . . there is a further reason why we should not now decide the principal question. Michigan has repealed Act No. 170 by Act 329, Public Laws of Michigan for 1947, reserving, however, from the effect of the repeal any 'pending suit or proceeding.' A possible consequence is that no new suit or proceeding could be maintained to enforce the repealed Act. Thus, to now decide this suit for a declaratory judgment might be to render an ad-

> visory opinion on the constitutionality of a repealed State Act. And, of course, a State cannot by reservation, any more than by affirmation, confer upon us the power or impose upon us the duty to render an advisory opinion."

Louisiana Act 709 of 1979 also implemented a new Louisiana community property system which became effective on January 1, 1980. Article 2346 is the new article of the Louisiana Civil Code providing the general management rule of the new community property system. It provides that "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." The enactment of this article signifies Louisiana's rejection of the "head and master" management system in favor of the general principle of "equal management".

Article 2347 specifically applies to immovable property, including the family home, and provides that:

> "The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, furniture or furnishings while located in the family home, all or substantially all of the assets of a community enterprise and movables issued or registered as provided by law in the names of the spouses jointly."

It is in this form that the Louisiana community property system must be reviewed. This Honorable Court stated in *Hall v. Beals,* 396 U.S. 45, 48 (1969) that:

> "...the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in

> light of the Colorado statute as it now stands, not at it once did . . ."

Articles 2346 and 2347 are not sexually discriminatory. They are not unconstitutional as violative of the Fourteenth Amendment of the United States Constitution. The general management rule grants equal power to each spouse to act alone in the management of the community property; article 2347 applies to specific transactions deemed by the Louisiana Legislature to be of such importance to the family that the concurrence of both spouses is necessary in order to render such transactions valid.

Pursuant to the *present* Louisiana law, appellant could not have obtained a valid mortgage on the Feenstra family home without the consent of Mrs. Feenstra. Nor can any married person of either sex who is subject to Louisiana's law alienate, encumber or lease community immovable property. Thus, the act done under authority of a Civil Code article found to be unconstitutional by the Fifth Circuit Court of Appeal is not "capable of repetition, yet evading review" so as to warrant this Honorable Court's review of this action as it did in *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969).

This Court stated in *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199, 203 (1968) that:

> "...A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur . . ."

Unlike the situation in *United States v. Concentrated Phosphate Export Association*, supra, the alleged constitutional action complained of in this case will not recur because of State Legislative action not because of a "voluntary cessation".

The only remaining question raised by appellant in this appeal is:

> "Does the Decision rendered by the Fifth Circuit Court of Appeals apply to Karl J. Kirchberg, thus preventing the Civil Sheriff of Orleans Parish from seizing the Feenstra home, or is the decision prospective only in that the holding does not apply to Kirchberg, and therefore he can proceed to enforce the mortgage and have the Feenstra home seized and sold?"

Appellant is, in effect, asking this court to clarify the meaning of the judgment of the Court of Appeals. The Court of Appeals has continuing power to accept and pass upon a petition to clarify an outstanding mandate, to declare what it meant by its' mandate, and to change the mandate. *Dickerson v. Continental Oil Company,* 476 F.2d 635 (5th Cir. 1973); *Meredith v. Fair,* 306 F.2d 374 (5th Cir. 1962); *National Comics Publications v. Fawcett Publications,* 198 F.2d 927 (2nd Cir. 1952).

CONCLUSION

Appellees respectfully submit that the constitutional issue presented by appellant in this appeal is moot. *Roth v. Delano,* 338 U.S. 226 (1949); *Hall v. Beals,* 396 U.S. 45 (1969).

Appellees also respectfully move that this appeal be dismissed as a matter of right, *United States v. W. T. Grant Company, 345 U.S. 629 (1953).*

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

LOUIS M. JONES
ASSISTANT ATTORNEY GENERAL

RONALD C. DAVIS
ASSISTANT ATTORNEY GENERAL

EAVELYN T. BROOKS
STAFF ATTORNEY

BY: _____

KENDALL L. VICK
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this _____ day of _____, 19_____.

BY:_____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and STATE OF LOUISIANA.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 1, of the Rules of this Court, motion is hereby made that the appellee, JOAN PAILLOT FEENSTRA, be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit.

Respectfully submitted,

GEORGE M. STRICKLER, JR.
1419 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112
(504) 524-3794

Geo. M. Strickler Jr.

Counsel for Appellee

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

JOAN FEENSTRA, being duly sworn, deposes and says in support of her motion for leave to proceed in forma pauperis:

1. I am the appellee in the case docketed in the United States Supreme Court, KARL J. KIRCHBERG v. JOAN PAILLOT FEENSTRA, ET AL., No. 79-1388.

2. My sole source of income for myself and my minor child is $208.00 per month from Supplemental Security Income and $57.00 per month from Aid to Families with Dependent Children. Because of my poverty, I am unable to pay the costs of this action or give security therefor and still be able to provide myself and my dependent child with the necessities of life.

3. Appellant Kirchberg seeks review of a decision of the Fifth Circuit Court of Appeals that held unconstitutional Louisiana's head and master statute that allows the husband alone the right to unilaterally alienate and encumber community real property without the wife's consent. I believe that I am entitled to redress and to affirmance of the decision below in order to protect my home from foreclosure of the mortgage that appellant obtained from my former husband without my knowledge or consent.

Joan Feenstra

Sworn to and subscribed before me,
this 4th day of April, 1980.

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 79-1388

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Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee.

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of this Court, moves that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

I.

STATEMENT

This case involves the constitutionality of Louisiana Civil Code Article 2404 which made the husband the "head and master" of the community estate.[1] It gave the husband, but not the wife, the exclusive power to alienate and encumber community property, and to do so without the wife's consent.

---

[1] Article 2404 was legislatively repealed in 1979. Effective January 1, 1980, a gender neutral scheme of joint community property management replaced the prior head and master regime. La. Civ. Code, arts. 2325-2376. See generally opinion below, Kirchberg v. Feenstra, 609 F.2d 727, 729 n. 1 (5th Cir. 1979).

In October, 1974, Mrs. Feenstra, appellee herein, filed criminal charges against her husband for molesting their child. While in Parish prison, Mr. Feenstra retained appellant Karl J. Kirchberg to represent him on that charge. Mr. Feenstra executed and delivered to appellant Kirchberg a promissory note for $3,000 as pre-payment of legal services, with interest at the rate of 8% per annum and providing for 30% additional attorneys' fees if not paid when due. Mr. Feenstra immediately paid appellant over $800 on that note. In order to secure full payment of the $3000 note, Mr. Kirchberg required Mr. Feenstra to execute a mortgage on certain real property that had been purchased by Mr. and Mrs. Feenstra. That property was community property under state law, and it was in the name of both spouses. Mrs. Feenstra neither consented to nor was she informed of the mortgage. A few days later, Mrs. Feenstra dropped the criminal charges against her husband. The spouses separated, and Mrs. Feenstra remained with her child on the mortgaged property. Sometime thereafter, Mr. Kirchberg demanded payment from Mrs. Feenstra of the remainder due on the note and threatened seizure of her home unless she paid her husband's debt. That was the first indication Mrs. Feenstra had of the mortgage on her property. Appellant Kirchberg then petitioned for foreclosure by executory process in the state courts in February, 1976.

Appellant Kirchberg also filed an action in the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment that he had not violated the Truth-in-Lending-Act, 15 U.S.C. § 1635(a), in connection with the mortgage. Mrs. Feenstra counterclaimed, inter alia, against appellant Kirchberg, the State of Louisiana and the Governor, urging that Louisiana Civil Code Article 2334 was unconstitutional on Equal Protection and Due Process grounds. Article 2334, as it existed prior to January 1, 1977, restricted the husband's Article 2404 powers to alienate property, provided that the wife had taken the affirm-

ative and additional step of executing and filing a notarized declaration that her consent and authority were needed for any subsequent alienation or encumbering of that property.[2] Mrs. Feenstra had made no such declaration.

The District Court in April, 1977, granted the motion of the State of Louisiana for summary judgment on Mrs. Feenstra's counterclaim for a declaration of unconstitutionality. The District Court (as did the Court of Appeals) saw the gravamen of her claim as directed against Article 2404, the head and master provision that gave the husband the exclusive power to unilaterally alienate the community estate, rather than against Article 2334 which could operate to partially restrict the husband's Article 2404 powers of alienation.

Mrs. Feenstra appealed the constitutional claim against appellant Kirchberg, the State of Louisiana and the Governor. The Fifth Circuit panel unanimously reversed, finding that Article 2404 was unconstitutional under the fourteenth amendment. The case was decided in an opinion issued December 12, 1979. A mandate issued on January 3, 1980 to the District Court. On January 1, 1980, Louisiana's current gender-neutral scheme for community property management went into effect. See above at n. 1. The new law, which came too late to benefit Mrs. Feenstra, repealed the statute declared to be unconstitutional by the Fifth Circuit. Only Mr. Kirchberg has appealed the Fifth Circuit's ruling to this Court.

---

[2] Since January 1, 1977, Louisiana Civil Code Article 2334 provided that any real property standing in the names of both spouses could not be mortgaged without the wife's consent. See opinion below, 609 F.2d at 730. That revision was not applicable to the 1974 mortgage at issue herein. Id. at n. 2.

II.

ARGUMENT

A. The merits of the constitutional claim warrant summary affirmance.

The Court of Appeals' decision is plainly correct, and prior rulings by this Court demonstrate that the issue of Article 2404's constitutionality is foreclosed in appellee's favor. Where legislative classifications by gender exist, and the sexes are similarly situated, it is well established that such "classifications . . . must serve important governmental objectives and be substantially related to achievement of those objectives." Califano v. Webster, 430 U.S. 313, 316-317 (1977) (per curiam); Craig v. Boren, 429 U.S. 190, 197 (1977). More recent decisions of this Court have reaffirmed the applicability of this "intermediate" standard of scrutiny to such gender based classifications. See, e.g., Caban v. Mohammed, 441 U.S. 380, 388 (1979); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring opinion of Powell, J.); Orr v. Orr, 440 U.S. 276, 279 (1979).

The Court of Appeals found that the State of Louisiana had failed to articulate an objective sufficient to withstand such scrutiny, and the court was unable to discern one. See opinion below, 609 F.2d at 734-735. Legislative provision for the management of marital property is certainly a valid interest of the state, but any such objective could obviously have "be[en] protected by means that d[id] not draw such an inflexible gender-based distinction." Caban v. Mohammed, supra, 441 U.S. at 392. As noted in Orr v. Orr, supra,

> Where . . . the State's . . . purposes are as well served by a gender neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.
>
> 440 U.S. at 283.

The state's failure to make the necessary inquiry into less generalizing gender-neutral means, plus the apparent availability of such means, resolves the analysis against the statute's constitutionality. The bare argument of administrative efficiency that was urged below was properly rejected, since statutory purposes reflecting the "State's preference" for a particular "allocation of family responsibilities under which the wife plays a dependent role" are impermissible. Orr v. Orr, supra, 440 U.S. at 279. See also Reed v. Reed, 404 U.S. 71, 76-77 (1971) (avoidance of "intra-family controversy" may not be mandated on the basis of sex). Assuming, therefore, that this intermediate tier of scrutiny is triggered, this Court's prior line of decisions necessarily precludes a finding contrary to that of the court below.

Moreover, the scrutiny noted above is fully applicable here. First of all, there is nothing to suggest that Article 2404's classification is related to any innate difference between men and women or that the sexes are somehow not similarly situated. Compare, e.g., Parham v. Hughes, supra (recognizing problematic aspects of proving natural father's versus natural mother's identity); Schlesinger v. Ballard, 419 U.S. 498 (1975) (dissimilar career opportunities properly reflected in different promotion rules for the sexes). Rather, the statute classifies solely on the basis of "administrative convenience and outworn cliches" by suggesting that men are to be preferred as marital property administrators to women. See Parham v. Hughes, supra, 440 U.S. at 355 (plurality opinion). On this score, the case is indistinguishable from Reed v. Reed, supra, which struck down Idaho's male preference laws regulating decedent estate administration. Like other classifications that this Court has overturned, Article 2404 runs the "inherent risk of reinforcing the stereotypes about the 'proper place' of women." Orr v. Orr, supra, 440 U.S. at 238; see also Caban v. Mohammed, supra, 441 U.S. at 389. The presumption that

the world of the marketplace is more appropriate for males than females has been consistently rejected as a basis for legislative distinctions. See, e.g., Orr v. Orr, supra, 440 U.S. at 283; Craig v. Boren, supra, 429 U.S. at 198 n. 14; Stanton v. Stanton, 421 U.S. 7, 14-15 (1975). Cf. Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975) (invalidating in face of sixth amendment challenge Louisiana's requirement that women alone take the affirmative step of previously filing a written declaration before being subject to jury service).

In addition, it cannot be seriously urged that the statute does not, in fact, gender classify. Compare, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (upholding facially neutral veterans preference statute). By its terms, the statute makes the husband alone the head and master, permitting him to alienate without his wife's consent. Had appellee, or any wife, desired to avoid the harshness of the codal provision, with respect to property such as that involved herein, she must have taken the affirmative step of filing a declaration stating that her authority and consent were required for any subsequent encumbering or alienation. Alternatively, she would have been required to secure her husband's agreement to relinquish his statutorily conferred advantages and contract-out of the community property regime. See generally opinion below, 609 F.2d at 732-734. In no event could the wife herself alienate without her husband's consent. The fact that there might have been no "insurmountable barrier" to the wife's protecting her interest is without constitutional significance here. Cf. Trimble v. Gordon, 430 U.S. 762, 773-774 & 775 n. 16 (1977). It is enough that a barrier is created for women only which is not otherwise constitutionally justified. As the court below aptly remarked:

> Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, Louisiana law extends a benefit to

men that is not extended to women.

609 F.2d at 734.

Finally, there is no other basis on which application of this middle tier of scrutiny might be avoided, or which might affect the outcome of that scrutiny once applied. The State's suggestion below, and echoed by appellant herein, is that deference is warranted where a state's regulation of property disposition and regulation of family life is concerned. See Labine v. Vincent, 401 U.S. 532 (1971). That argument is unavailing here. While a state may have a valid interest in promoting family life by discouraging illicit relationships through certain legislative distinctions between legitimacy and illegitimacy, such an interest is not implicated in a head and master system that seeks only to promote and perpetuate certain roles for the sexes within the family. Compare, e.g., Parham v. Hughes, supra; Lalli v. Lalli, 439 U.S. 259 (1979) (plurality opinion); Labine v. Vincent, supra. In addition, whatever latitude may be accorded a state's regulations pertaining to property disposition, "there is a point beyond which deference cannot justify discrimination." Trimble v. Gordon, supra, 430 U.S. at 767-768 n. 12 (explicitly limiting any contrary implication in Labine, supra); see also Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972) ("Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental rights, this Court exercises a stricter scrutiny"). While the proposition is self-evident, the fourteenth amendment is not rendered inoperative by the presence of state statutes that implicate property disposition. See Reed v. Reed, supra. Given Article 2404's invidious discrimination and the availability of less sweeping, gender neutral means to achieve the state's permissible objectives, the requisite intermediate scrutiny is not satisfied, much less foreclosed. The merits of this claim warrant summary affirmance.

B. Plenary consideration is otherwise unwarranted.

There are other factors strongly militating against plenary consideration by this Court. The decision below was explicitly made nonretroactive. It was decided in an opinion issued on December 12, 1979. On January 1, 1980, previously passed legislation went into effect that repealed Article 2404, substituting in its place a comprehensive gender-neutral scheme for community property management. Thus, even in the absence of the Fifth Circuit's decision of unconstitutionality, the head and master system has been laid to rest. It is also unlikely that anyone other than the parties litigant will be affected by this decision. In addition, neither the State nor the Governor have bothered to appeal the Fifth Circuit's decision. Their conspicuous absence coupled with the legislative interment of Article 2404 suggest that the state's interests would be minimally affected, if at all, by summary disposition of this case. Appellant's catalog of horrors portending the dismantling of "vested rights" and the wide-scale undermining of settled expectations is, in light of these events, exaggerated. Moreover, Mr. Kirchberg's own "financial interests" (Jurisdictional Statement at 7), if relevant, are de minimis. The mortgage in question was given by the husband as security for a promissory note. The Fifth Circuit's decision does not purport to affect Mr. Kirchberg's rights to enforce the note personally against Mr. Feenstra. These factors all minimize the importance of this case, and speak for summary disposition.

C. No other substantial questions are presented.

Appellant has presented two additional questions that purport to be implicated in this appeal. The first asks whether the Court of Appeals overruled, not just a statute, but "in effect overrule[d] major principles of the Civil Law of Louisiana." (Jurisdictional Statement at 4). As previously suggested, the ramifications of this ruling are negligible given the Article's legisla-

tive repeal and the court's prospective ruling. Any statutory ga that might otherwise have been created by the ruling were quickl filled. Neither the ruling nor the new legislation purport to u set the continued existence of a community property regime withi the state. Moreover, while the "head and master" provision may have been a fundamental principle of one part of the Civil Code, no less fundamental is the duty of the judiciary to rule on case and controversies properly before them and to state "what the law is." United States v. Nixon, 418 U.S. 683, 703 (1974), quoting from Marbury v. Madison, 1 Cranch 137 (1803). Finally, assuming that this question is directed to the propriety of a federal cour passing on state schemes concerning the family or property, it ha been addressed above (p. 7).

Appellant's third question asks whether the Fifth Circuit determination that its decision is nonretroactive means that the decision is inapplicable to the parties litigant. This also does not present a substantial question for this court's consideration.

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of Constitutional issues, "concrete legal issues presented in actual cases, not abstractions" are requisite. This is as true of declaratory judgments as any other field.
>
> United Public Workers v. Mitchell 330 U.S. 75, 89 (1947).

Whatever debate may exist as to the appropriate effect of constitutional overrulings on non-parties, any ruling, including a prospective one, is applicable to the parties litigant. The requirement that Mrs. Feenstra benefit from the prospective overruling is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." Stovall v. Denno, 388 U.S. 293, 301 (1967). See also Comment, 71 Yale L. J. 907, 933 (1962); H. Wellington, Notes on Adjudication, 83 Yale L. J. 221, 260 n. 102 (1973); United States v. Peltier, 422 U.S. 531, 547-

548 n.6 (Brennan, J. dissenting); but cf. Linkletter v. Walker, 381 U.S. 618, 621-622 (dictum).

Even if a constitutional ruling by an Article III court which was non-binding on the parties litigant were constitutionally permissible, there is no justification for, and the Fifth Circuit did not make, such a ruling here. (See Jurisdictional Statement at 5 & 7). The Court of Appeals went out of its way to note the existence of an actual controversy in appellant's continued avowal to enforce his mortgage. 609 F.2d at 731. Moreover, this issue was fully briefed below by the State and appellee herein. The State's own brief urged the Court to grant prospective relief that would be applicable to Mrs. Feenstra alone. Her Reply Brief agreed with the State on the question of prospectivity, and urged that it should not be at issue. Given the expressed desires of the briefing parties and given the standard learning that prospective rulings apply to the parties litigant, it is inconceivable that the Fifth Circuit took the extraordinary course of not applying its decision to the parties herein. Moreover, clarification of the Fifth Circuit's meaning as to its opinions may be accomplished by means other than recourse to this Court.

III.

CONCLUSION

For the above reasons, appellee respectfully submits that appellee presents no substantial question for the decision of this Court, and that the judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis, accompanying affidavit, and Motion to Affirm, were mailed, first class postage prepaid, in accordance with Rule 33 of the Rules of this Court, to each of the persons listed below. I further certify that all parties required to be served have been served.

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This 4th day of April, 1980.

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ORIGINAL BRIEF

ON BEHALF OF THE APPELLANT

KARL JAN KIRCHBERG

Supreme Court, U.S.
FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG

Appellant,

--V--

JOAN PAILLOT FEENSTRA

Appellee.

--V--

EDWIN W. EDWARDS
and STATE OF LOUISIANA
ON APPEAL FROM THE
FIFTH CIRCUIT COURT OF
APPEALS FOR THE UNITED STATES
OF AMERICA

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2.

Reference to the official and unofficial reports of the opinions delivered in the Lower Courts

The official and the unofficial reports of the opinions delivered in the United States District Court for the Eastern District of Louisiana, and the Fifth Circuit Court of Appeals for the United States of America are found in the appendix at pages A-1 through A-84.

3.

A Concise statement of the grounds on which jurisdiction is invoked

This decision is appealed pursuant to Title 28 U.S.C.A. Section 1254, which states as follows: "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such petitioner,

and the review on appeal shall be restricted to the federal questions presented."

The Fifth Circuit Court of Appeals rendered its decision in this matter on December 12, 1979, (Appendix page 40). The Appellant, Karl J. Kirchberg, filed his jurisdictional statement on March 8, 1980, and Probable Jurisdiction was Noted on April 28, 1980.

4.

Constitutional Statutes upon which the CASE Involves

The following Statutes are involved in this litigation:

(a)

U.S.C.A. Const. Amend. XIV §1 page 33, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b)

Art. 2404. Rights and restrictions of husband as master of community. Art. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which

they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property or otherwise disposed of the same by fraud, to injure his wife, she may have her action against heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (as amended by Acts 1926, NO. 96)

Editorial Comment

R.S. 9:2801 - 9:2804 (acts 1921, Ex. Sess.,NO. 35) provides for a designation and declaration of family home and recordation thereof. Thereafter the husband may not sell or mortgage the family home except with the consent of the wife. L.S.A. - C.C. art. 2404, Volume 9A, page 346.

5

Questions Presented By The Appeal

1) Does Louisiana Civil Code Article 2404 violate the equal protection clause of the Fourteenth amendment: U.S. Constitution Amendment 14?

2) Did the Court of Appeals only hold that Article 2404 of the La. C.C. is unconstitutional or did the Court in effect overrule principles of the Civil Law of Louisiana enumerated and expressed throughout the Civil Code?

3) Does the Decision rendered by the Fifth Circuit Court of Appeals apply to Karl J. Kirchberg, thus preventing the Civil Sheriff of Orleans Parish from seizing the Feenstra home, or is the decision prospective only in that the holding does not apply to Kirchberg, and therefore he can proceed to enforce the mortgage and have the Feenstra home seized and sold?

Concise Statement of The Case

This particular litigation originated from an act of mortgage executed in 1974 by Mr. Feenstra as the mortgagor and Karl J. Kirchberg, as the mortgagee. The mortgage covered the family home, and said domicile was registered in the names of Mr. and Mrs. Feenstra. The indebtedness represented by the promissory note, was never repaid. As a result, the Civil Sheriff for the Parish of Orleans, State of Louisiana, by executory process, was directed and ordered to seize and to sell the Feenstra Home. Kirchberg subsequently filed a petition for declaratory judgment against Mrs. Feenstra. She opposed the foreclosure on the property, contending that Kirchberg had violated the Truth In Lending Act, 15 U.S.C. 8:1601, et. seq. Thereafter, Kirchberg instituted a proceeding in the United States District Court for the Eastern District of Louisiana, praying for a declaratory judgment

that he had not violated the act. Mrs. Feenstra answered the complaint, and she asserted two counterclaims. In the first counterclaim, she sought rescission of the mortgage for Truth-In-Lending violations. In the second counterclaim, she sought a declaration that article 2334 of the Louisiana Civil Code was unconstitutional, because it violated the equal protection and due process clauses of the fourteenth amendment. The second counterclaim was asserted against the Governor of the State of Louisiana and the State of Louisiana, as well as against Karl J. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim. The District Court granted the summary judgment against Mrs. Feenstra and she appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit held that Article 2404 of the Louisiana Civil Code, violated the equal protection clause of the Fourteenth Amendment. Appellant, Karl J. Kirchberg has appealed the decision of the Fifth Circuit

Court of Appeals to This Honorable Tribunal.

7

Summary of Argument

Karl J. Kirchberg contends that Article 2404 of the Louisiana Civil Code does not violate the equal protection clause of the Fourteenth Amendment. Furthermore, the deletion of this Article from the Civil Code of the State of Louisiana will overrule major principles of the Louisiana Civil Code, thus resulting in a chaotic state of affairs within the Commercial Law of Louisiana. Finally, Kirchberg contends that the Fifth Circuit Court of Appeals decision should be applied prospectively so as to permit Kirchberg to enforce his mortgage against the Feenstra Home , in the event that Article 2404 is declared to be unconstitutional.

8.

Argument

It is the contention of the appellant, Karl J. Kirchberg, that Article 2404, La. C. C. (1870) (as amended by acts 1926 No. 96) does not violate the equal protection clause of the Fourteenth Amendment. The appellant would turn the attention of this Honorable Tribunal to the language and analysis of the Firth Circuit Court of Appeals opinion in order that the scope of the errors in said judgment be identified.

The appellant would argue that the lower court decisions relied upon in the opinion are distinguishable upon their facts, from the instant factual situation. In Trimble vs Gordon, 430 U. S. 762, 97 S. Ct. 1459 (1977), the State law was held to violate the Fourteenth Amendment Equal Protection Clause, because illegitimate children faced discrimination under the intestate laws. Also, in Reed vs Reed, 404 U. S. 71, 92 S. Ct.

251 (1971), State law granted a statutory preference to males as administrators of the estates of intestates. This law also fell under the equal protection clause of the Fourteenth Amendment. Furthermore, Craig vs. Boren, 429 U. S. 190, 97 S. Ct. 451 (1976), held the two sections of an Oklahoma Statute to be unconstitutional because the gender-based differential constituted a form of invidious discrimination against males age 18-20 years of age, and thus violative of the Fourteenth Amendment. In the recent decision of Orr vs. Lillian M. Orr, 99. S. Ct. 1102 (1979), 440 U. S. 268, this Court struck down the Alabama State Statute which authorized only the husband to pay alimony to his wife. As previously stated, all of these decisions were the foundation for the errors in reasoning advanced by the Fifth Circuit in Kirchberg vs. Feenstra, 609 F.2d., 727 (1979).

It is important to note that in Trimble,

Reed, Craig, and Orr, it was impossible for the disadvantaged person, who had been denied the equal protection of the laws, to overcome the insurmountable barrier established by State Law. The disadvantaged person, in each of these aforementioned cases, was dependent upon the will, decision, and action, of a third person in the determination of his or her economic destiny.

In Trimble, the decedent could have drafted a will devising property to his offspring, but he did not choose to do so. The important point to note is this: It was impossible for the illegitimate child to legally force his father to bequeath property to him. Similarly, in Reed, the power to name an administrator was within the reach and grasp of the testator - not the disadvantaged female administrator. In Craig, there was no legislative escape devise whereby, males and females might drink at the same age.

However, in our present factual situation, Mrs. Feenstra, the "supposedly disadvantaged" individual, possessed the power to prevent Mr. Feenstra from encumbering their household. That power resided in Article 2334 of the La. C.C. (1870), which provided that the wife could prevent the mortgage of her home by filing a declaration by authenic act that her consent was required for her husband to mortgage community immovable property. The article provided that the declaration be recorded in the mortgage and conveyance records of the Parish in which the property was situated. It is important to note that the authentic act in Louisiana only requires that a Notory and Two Witnesses execute the instrument, LSA-C.C. Art. 2234, Volume 8, page 335. The only other costs would be recording expenses and the possible expense for the use of an attorney. However, an attorney's fee would not be required. Also,

as is stated in Corpus Christi Parish Credit Union vs. Martin (S. Ct. La.) (1978) 358 So. 2d. 295, (page 298), "Louisiana statutes provide a simple method for the wife to prevent the alienation of the family home. At the time of the execution of this mortgage, R. S. 9:2802 . . . provided that the wife . . ., can file in the conveyance records a designation of the family home, and 'it may not thereafter be validly sold or mortgaged during the marriage by the husband except with the consent of his wife expressly set forth in the act, and signed by her.'"

Therefore, the Court of Appeals fell into error at that particular portion of the opinion which emphasized "Transactional Costs." As the Court stated, 609 F. 2d. 727 (page 734) Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community

manager, and it does not place that burden and expense on couples wishing to make the husband the manager." However, the Law of Louisiana was such that no formal antenuptial agreement was needed or required to remedy the present problem. The only prerequisite to the solution of the instant dilemma, was a notorized affidavit - far less expensive than a formal antenuptial agreement. As noted earlier, Mrs. Feenstra failed to utilize the inexpensive remedy provided for her by the Laws of the State of Louisiana. Appellant would further submit that she has been the architect of her own predicament.

The Second issue posed by appellant concerns the deletion of major principles from the Civil Law of the State of Louisiana, if the Fifth Circuit opinion should be upheld. As noted earlier, the appellant contends that Louisiana Law applies a system of balanced equality to the realationship existing

between Husband and Wife. Indeed, the Community Property System is known as a matrimonial regime, and this balanced regime was given emphasis in this Court's noted decision of Labine vs. Vincent, 401 U.S. 532, 91S.Ct. 1017, 28 L. Ed. 2d. 288 (1970). Moreover, Judge Sear gave a lengthy expression to the Louisiana Community Property System in Kirch berg vs. Feenstra, 430 F. Supp. 642 (E. D. La. 1977), in which he upheld the Constitutionality of Article 2404. For the moment, appellant invites this Honorable Tribunal to journey with him on an excursion through the Louisiana Civil Code, as he describes the various features of this balanced and equal regime.

The First 24 articles of the Louisiana Civil Code, [articles 1-23; La. C.C. (1870)] define the nature of the legal system in our jurisdiction, and the manner in which the articles of the Louisiana Civil Code are to

be read and interpreted. Focusing upon (Article 17, La. C. C. 1870) we find that the laws of the State are to be read in pari materia, meaning that they are to be read together and in reference to each other to further clarify their meaning within the entire codal system.

Kirchberg would turn this Honorable Court's attention to Article 2410 of the La. Civil Code of (1870), as a prime example of the system of balanced equality established in the code. As is stated therein, Art. 2410, Volume 9A, page 478 (2410) La. C. C. 1870 "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains." It is the contention of the appellant that this article was overruled by the decision rendered in Kirchberg vs. Feenstra 609 F. 2d. 727, because the underlying basis and rationale for this article is indeed Article 2404. Beal vs. Ward,

(Ct. of Appeal of Louisiana) (Orleans) (127 So. 423) (1930) Louisiana Bank and Trust Company vs. Pernici, La. App., 372 So. 2d 788 (Second Circuit), (1979) and Creech vs. Capitol Mark, Inc. 287 So. 2d 497 (S. Ct. of La.) (1973); all discuss the relationship between Article 2404 of the La. Civil Code and the power of the wife to renounce her debts of the Community Estate. In summation, it may be said that because the husband is the head and master of the community, the wife is given the option to renounce her one-half interest in the community of acquets and gains, Creech vs. Capitol Mark, Inc. 287 So. 2d. 497, (S. Ct. of La. 1973).at page 508. Hence, it would not be possible after the date of Dec. 12, 1979, to decide which party to the marriage would have the right to renounce the debts of the community estate. Possibly, neither the husband nor the wife would retain this option. If Article 2404 is unconstitutional as of the date of December 12, then Article 2410, an article dependent upon 2404, must logically

also be unconstitutional, and the entire doctrine of renunciation must be modified or deleted completely from the Civil Law of Louisiana.

Furthermore, we are faced with an even more perplexing issue in the field of Commercial Transactions involving Community Immovable Property. Who will have the power and right to alienate community immovable property after the date of Dec. 12, 1979 and before the date of Jan. 1, 1980? Must both the husband and the wife sign all acts of sale or could either sign the act of sale? The answer is again unknown. Who has the power to mortgage community immovable property during that time period? The answer is again unknown. Has not the decision rendered in Kirchberg vs. Feenstra cast a shadow of uncertainty upon all of these aforementioned commercial transactions from the date of Dec. 12, 1979, until the date of Jan. 1, 1980?

The third issue raised by appellant concerns the supposedly prospective application of this decision. As is stated in Kirchberg vs.

Feenstra, 609 F. 2d 727 (1979) at page 735, footnote 19, "our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana renders unnecessary a decision on the limiting portion of article 2334." Furthermore, as is stated in Kirchberg, at page 735," we apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana."

The appellant would urge this Court to consider carefully the grave consequences which will flow from this decision if the rationale advanced by the Fifth Circuit Court of Appeals is upheld. At first it would appear that according to the aforementioned quotations, that Article 2404 La. C. C. (1870), is unconstitutional as of the date of December 12, 1979. Appellant would submit that if Article 2404 were unconstitutional on the date of December 12, 1979,

and if the decision were prospective only, then by logical inference, the mortgage executed by Mr. Feenstra was valid according to the Fourteenth Amendment on the date of October 22, 1974. Therefore, Kirchberg could proceed to have the Feenstra Home seized and sold in spite of the decision rendered on the date of December 12, 1979.

However, if the decision is prospective only; and if this should mean that the holding applies to Kirchberg and to the Feenstras, thus blocking the seizure and sale of the home, then logically, there will follow great and substantial hardship with respect to property rights and obligations within the State of Louisiana. This result will follow for two reasons, either of which will produce a chaotic situation in the commercial trade of the State of Louisiana. The first situation that will develop concerns all mortgages executed by husbands alone from the date of October 22, 1974, to the present date.

If the Feenstra mortgage signed by the husband, is invalid, then all mortgages executed by the husband alone, without the wife having recorded her declaration by authenic act would be invalid, if said encumbrances were established after the date of October 22, 1974. This would also mean that potentially hundreds or thousands of these mortgages would be declared null and void should the debtors default on payments and the creditors foreclose. This would leave many creditors without a significant legal remedy to enforce the collection of the debts. The underlying security could not be seized or sold. It is obvious that many creditors extended money to debtors during the time period in question, from 1974 to January 1, 1980, having relied upon the Head and Master Laws, article 2404 La. C. C. (1870). The law was declared to be invalid as of the date of December 12, 1979, and if Kirchberg cannot enforce his mortgage against the family home, neither can any other mortgagee-creditor enforce his rights against family homes.

In short, the appellant is arguing with sound logic that it is impossible for the Fifth Circuit Court of Appeals to apply its decision "Prospectively" if the holding also means that he cannot enforce his rights as mortgagee. If he cannot have the Feenstra Home seized and sold, then the decision is truly retroactive to the date of October 22, 1974, and no other mortgagee will be able to seize and to sell family homes encumbered after that date by signature of the husband alone, thus creating the very "substantial hardship" that this decision was supposedly tailored to avoid, Kirchberg vs. Feenstra, 609. F. 2d. 727, at page 735.

Moreover, a variety of perplexing problems would arise in the property and succession law of the State of Louisiana, even if this decision is applied prospectively. As noted earlier, from the date of December 12, 1979, to the date of January 1, 1980, it is impossible to determine who would have the power to alienate, mortgage, or lease, community immovable property within

the family structure. As mentioned earlier, the doctrine of renunciation is also placed in jeopardy, along with other Civilian Doctrines and Principles expressed throughout the Civil Code of Louisiana. Thus, it is apparent that this decision will produce substantial inequitable results even if it is applied prospectively.

9

Conclusion

Thus, the appellant, Karl Jan Kirchberg, prays that the Supreme Court of The United States of America reaffirm the decision rendered in Kirchberg vs. Feenstra, 430 F. Supp. 642 (E. D. La. 1977) and reverse the decision rendered in Kirchberg vs. Feenstra, 609 F. 2d 727 (1979); and declare that Art. 2404 La. C. C. (1870) did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, and that an order proceed in due course allowing Kirchberg to have the Feenstra Home seized and sold to satisfy the indebtedness owed to the appellant.

In the alternative, should this Honorable Tribunal decide that Art. 2404 La. C. C. (1870) is repugnant to the Fourteenth Amendment of the Constitution, then said appellant would pray that this decision be applied prospectively so that a decree might proceed from The Supreme Court of The United States permitting appellant

to satisfy the indebtedness owed to him by way of seizure and sale of the Feenstra Home.

10

CERTIFICATE OF SERVICE

I, Karl J. Kirchberg, appearing as appellant in proper person, and I, Alan Ford Schoenberger, appearing as Attorney Pro Hoc Vice, do affirm on this 26th day of June, 1980, that we have served upon the following named parties by depositing (3) three copies of this brief in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to the following counsel of record on this aforementioned date:

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No. 79-1388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and
STATE OF LOUISIANA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE, JOAN PAILLOT FEENSTRA

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QUESTIONS PRESENTED

I. Whether Louisiana Civil Code Article 2404, which gives the husband, as head and master of the community, the power to alienate community property without the consent and permission of his wife, denies the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.

II. Whether the prospective ruling of the Fifth Circuit Court of Appeals, which held Article 2404 of the Louisiana Civil Code unconstitutional, should be applied to the parties litigant to void the mortgage held by appellant on appellee's home.

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals is reported at 609 F.2d 727 (1979). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 430 F.Supp. 642 (1977).

STATEMENT OF THE CASE

During the course of their marriage, Joan and Harold Feenstra purchased a family home located on Irish Bayou Subdivision, Lot #7, Section 8, New Orleans, Louisiana. At first, they rented this property and used their rental payments as a downpayment on its purchase. Finally, they purchased their home in both their names and paid off their mortgage on the home. Harold Feenstra used his wages to make both the rental payments and mortgage payments. Mrs. Feenstra, however, also contributed her earnings from her fishing to the rental and mortgage payments. Therefore, under both Louisiana law and equity, she owns a share of the community real property.

In October of 1974, appellee, Mrs. Feenstra, learned that her husband, Harold Feenstra, had molested their daughter. Joan Feenstra asked her husband to leave their marital abode, but he refused. She was forced to file criminal charges against her husband as her only means of keeping her husband away from the family home and so protecting her child. Harold Feenstra was arrested and imprisoned on or about October 12, 1974, and charged with crime against nature upon his nine-year-old daughter.

From Parish Prison, Harold Feenstra retained Karl J. Kirchberg, plaintiff and defendant in counterclaim, to defend him against these charges. On October 17, 1974, Harold Feenstra signed a promissory note as pre-payment for legal services to the order of Karl J. Kirchberg for $3,000.00 with interest at the rate of 8% per annum and providing for 30% attorney's fees if not paid when due. The following day, Feenstra made a payment to Karl J. Kirchberg of $809.57. On October 22, 1974, Harold Feenstra executed an Act of Mortgage, in favor of Kirchberg. This Act of Mortgage

reiterated a debt of $3,000.00 despite Feenstra's prior payment.

Mrs. Feenstra was not informed nor was she given any notice whatsoever of the execution of recordation of the mortgage on her home. She had no idea of the existence of the mortgage on her home until, well over a year after the mortgage was executed, Kirchberg threatened the seizure of her home unless she paid her husband's legal debt, stating he was going to use the property for trailer rentals. Kirchberg would not send a copy of the mortgage to Mrs. Feenstra's attorney. Her first official notice of the existence of the mortgage was Kirchberg's suit in Civil District Court for a mortgage foreclosure by executory process.

Without any knowledge that her home had been mortgaged or the existence of her husband's attorney, Mrs. Feenstra dismissed the charges against her husband. She had removed the threat upon her daughter and was reluctant to put her daughter in the further damaging position of testifying at trial against her father and being cross-examined. Harold Feenstra was released from custody and liability and had no need for legal representation. Mrs. Feenstra was responsible for the cessation of further criminal action being taken against Feenstra.

Harold Feenstra moved into his own quarters after his release from jail. He desired to give his wife the entire interest in their community home and move out of state. Kirchberg told Feenstra he would draw up the necessary papers for signature, but he never did. C. Howard McCaleb, III, Kirchberg's associate, obtained a separation from bed and board for Feenstra on June 10, 1975. Feenstra made payment to Kirchberg for $150.00 on the date prior to the filing of this petition and for $75.00 on the date of judgment. Feenstra then moved out of state with the belief that the property would be turned over to his wife.

After judgment was obtained for their legal separation, Kirchberg demanded payment from Mrs. Feenstra and threatened seizure of her home. In February, 1976, he petitioned for a mortgage foreclosure by executory process in Civil District Court for the Parish of Orleans, entitled *Karl J. Kirchberg vs. Joan Paillot, widow of first marriage to Tweed Keller Marsh, wife of/and Harold C. Feenstra,* No. 76-3121. Pursuant to said petition an order for executory process was issued and the Civil Sheriff for the Parish of Orleans seized and is presently holding the real property which is the subject of said mortgage.

Appellant Kirchberg also filed an action in the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment that he had not violated the Truth-in-Lending-Act, 15 U.S.C. §1635(a), in connection with the mortgage. Mrs. Feenstra counterclaimed, *inter alia,* against appellant Kirchberg, the State of Louisiana and the Governor, urging that Louisiana Civil Code Article 2334 was unconstitutional on equal protection and due process grounds. Article 2334, as it existed prior to January 1, 1977, was a companion to Article 2404 in that it allowed the husband to alienate real community property without the wife's knowledge or consent provided that the wife had not taken the affirmative and additional step of executing and filing a notarized declaration that her consent and authority were needed for any subsequent alienation or encubmerging of that property.[1] Mrs. Feenstra had made no such declaration.

---

[1]Since January 1, 1977, Louisiana Civil Code Article 2334 provided that any real property standing in the names of both spouses could not be mortgaged without the wife's consent. See opinion below, 609 F.2d at 730. That revision was not applicable to the 1974 mortgage at issue herein. *Id.* at n.2.

The District Court in April, 1977, granted the motion of the State of Louisiana for summary judgment on Mrs. Feenstra's counterclaim for a declaration of unconstitutionality. The District Court (as did the Court of Appeals) saw the gravamen of her claim as directed against Article 2404, the head and master provision, that gave the husband the exclusive power to unilaterally alienate the community estate.

Mrs. Feenstra appealed the constitutional claim against appellant Kirchberg, the State of Louisiana and the Governor. The Fifth Circuit panel unanimously reversed, finding that Article 2404 was unconstitutional under the Fourteenth Amendment. The case was decided in an opinion issued December 12, 1979. A mandate was issued on January 3, 1980 to the District Court. On January 1, 1980, Louisiana's current gender-neutral scheme for community property management went into effect. The new law, which came too late to benefit Mrs. Feenstra, repealed the statute declared to be unconstitutional by the Fifth Circuit. Only Mr. Kirchberg has appealed the Fifth Circuit's ruling to this Court.

SUMMARY OF ARGUMENT

The court below held that Article 2404 of the Louisiana Civil Code, which designated the husband as head and master of the community and gave him exclusive power to administer the community estate, was violative of the equal protection clause of the Fourteenth Amendment. The Fifth Circuit decision, supported in all respects by this Court's precedents and by common principles of equity warrants swift and secure affirmation.

I

The Louisiana head and master system unconstitutionally discriminates on the basis of sex. The absolute power over marital property which it bestows to men reinforces the sterotypes, long imposed by society, that wives because of their dependency on their husbands are inferior in managerial and business skills. The gender-based classification established by state law is burdened with the "baggage of sexual sterotypes." The citizens of Louisiana and any legislative purpose could be better served by a gender-neutral scheme of management over community property which avoids the sharp sex lines drawn by Article 2404, *Orr v. Orr,* 440 U.S. 268,282 (1979). As of January 1, 1980, Louisiana has repealed this patently offensive statute and substituted a system of equal management for its invidiously discriminatory head and master scheme.

A gender-based classification is subject to equal protection scrutiny which demands that such classifications "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren,* 429 U.S. 190, 197 (1976). Article 2404 which allows husbands to alienate and control the marital property, but which never allows wives an equal share of managerial power, has definitely established a gender-based classification. And the sharp sex lines drawn by the State cannot be avoided by elaborate statutory declarations or prenuptial contracts which the wife must record in order to free herself of male domination over the marital property. Whether or not an insurmountable barrier exists to prevent a litigant from freeing herself of a state's discriminatory action is an "analytical anomaly" and bears no "constitutional significance," *Trimble v. Gordon,* 430 U.S. 762, 773-74 (1977).

It is difficult to determine what the legitimate state interest is in fostering the sex-based classification of the head and master scheme, but all the proposed and possible state objectives for the discriminatory nature of Article 2404 bear no substantial relationship to the gender-based classification. Moreover, the Louisiana Legislature's adoption of a gender-neutral system for community management, effective January 1, 1980, is suggestive of the fact that it is not possible to show the substantial relationship between Article 2404 and the objective sought to be achieved by Article 2404, *Kirchberg v. Feenstra,* 609 F.2d, 727, 735 (5th Cir. 1979). Thereby the Louisiana head and master system over community property does gender-classify and should not survive present constitutional scrutiny. See *Orr v. Orr,* 440 U.S. 268, 282-83 (1979).

II

The declaration by the lower court that Article 2404 is unconstitutional as of December 12, 1979, has had minimal, if any impact, on the smooth functioning of community management and creditors' rights as against married persons. Since 1977 no husband in Louisiana could alienate community immovable property without the consent of his wife, unless a declaration to the contrary was recorded by his wife, Louisiana Civil Code Ann. Article 2334 (as amended, West Supp. 1979). On January 1, 1980, previously passed legislation went into effect that repealed Article 2404, so everyone in Louisiana has been on notice for months that the judicially decreed unconstitutional activity would no longer be sanctioned by statute. Furthermore, the decision below was made non-retroactive. It is highly unlikely that anyone

other than the parties litigant will be affected by the lower court's pronouncement.

In addition, neither the State nor Governor have appealed the Fifth Circuit decision. Their conspicuous absence coupled with the repeal of Article 2404 strongly suggest that the State's interests have not been impaired in any way. In fact, in June 1980, the State filed a Motion to Dismiss this appeal and have filed as appellees. The State must consider that its Civil Code is secure and its citizens protected despite the holding of the unconstitutionality of the head and master scheme. Surely, appellant Kirchberg does not need to partake in a cause on behalf of the State when the Attorney General's Office has declined to do so. Appellant's catalog of horrors portending great harm to creditors and the "balanced equality" of the Civil Code, in light of these events, is exaggerated.

III

Appellant Feenstra is not asking this Court to make retroactive a holding that Article 2404 is unconstitutional, but rather that a prospective only decree include the parties litigant so that the mortgage held on her family home may be declared null and void. Otherwise Mrs. Feenstra's long struggle through the Federal courts would have been in vain. Because Article 2404 has been repealed as of January 1, 1980 and the Fifth Circuit decision was made prospective as of December 12, 1979, it is impossible that any one other than Mr. Kirchberg and Mrs. Feenstra would be affected by the declaration of the unconstitutionality of the Louisiana head and master system. This was the intention of the State when they originally asked for a prospective ruling from the

Fifth Circuit, as evidenced by their brief to the lower court, their failure to appeal the Fifth Circuit decision, and their subsequent Motion to Dismiss the Appeal filed as appellees. It was the intention of Mrs. Feenstra when she agreed not to contest a prospective ruling.

Article III of the Constitution compels Federal Courts only to resolve actual, concrete cases and controversies and not address hypothetical questions. The Fifth Circuit went out of its way to state that a case and controversy was presented by the parties before the Court, *Kirchberg v. Feenstra,* 609 F.2d 727, 731 (1979), which indicates the holding of unconstitutionality, while prospective only, was intended to apply to the mortgage on Mrs. Feenstra's home. Any other interpretation would result in an advisory opinion below. Mrs. Feenstra's benefit from the prospective overruling of Article 2404 is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum", *Stoval v. Denno,* 388 U.S. 293, 301 (1967). If not parties would lose all incentive to bring lawsuits seeking the overruling of patently offensive law.

Thus, there is no precedent and no equitable reason for the parties litigant to be excluded from a prospective overruling of Article 2404. Any other result would be contrary to the expressed desires of the briefing parties before the Fifth Circuit, and the lower court decision would stand as an advisory opinion.

ARGUMENT

I

THE LOUISIANA HEAD AND MASTER STATUTE IS UNCONSTITUTIONAL AS IT DISCRIMINATES ON THE BASIS OF SEX AND VIOLATES THE FOURTEENTH AMENDMENT.

A. The standard to be applied to gender based classifications is that they must serve important governmental objectives and must be substantially related to the achievement of those objectives; Article 2404 cannot withstand such equal protection scrutiny.

The last decade has seen the evolving of a standard of review to be applied when gender is the basis of legislative classifications. The analysis began in 1971, in *Reed v. Reed,* 404 U.S. 71, when this Court put lawmakers on notice that mere rational basis for a sex-based classification would no longer survive constitutional scrutiny. The Idaho statute which gave mandatory preference to a male over a female for appointment as administrator of an estate was held to be a denial of equal protection because the preference failed to have a "fair and substantial relation" to the legislative objective, *id* at 76. Since 1976, the rule set out in *Craig v. Boren,* 429 U.S. 190, 197, has been recognized as the standard of review to be applied to sex discrimination cases.

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

This stricter standard of review for gender-based classi-

fications has been frequently reaffirmed by this Court; *Califano v. Webster,* 430 U.S. 313, at 316-317 (1977), (per curiam); *Orr v. Orr,* 440 U.S. 268, at 279 (1979); *Califano v. Westcott,* 433 U.S. 76, at 85 (1979); *Wengler v. Druggists Mutual Ins. Co.,* ____ U.S. ____, at ____, 64 L. Ed. 2d 107, at 115 (1980). There can be no doubt that Louisiana Civil Code Article 2404[2] fails to survive this substantial scrutiny and offends any notion of equality in marriage.

The first step in determining the constitutionality of the Louisiana head and master statute is to establish that a gender based classification does indeed exist. Through Article 2404, Louisiana has established a most obvious discriminatory scheme because of its automatic preference for husbands over wives. On its face it gives all power of management of the community property to the husband and leaves nothing for the wife, except the right to sue his heirs at the dissolution of the community if she can prove he injured her by fraud. By making the husband the head and master of the community and giving him the unlimited power to administer and alienate all community property without the consent or permission of his wife, the State of Louisiana has clearly created a classification by gender.

---

[2]Article 2404 stated:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Article 2404 was repealed effective January 1, 1980. However, all mortgages executed prior to 1980 are subject to the husband's head and master powers, and appellee, Mrs. Feenstra, is not affected by the repeal. Hereinafter, all references to Article 2404 will be made to the above statute as it existed prior to the repeal.

In the case at bar, Mrs. Feenstra never knew of the mortgage on her home until after her husband had left the State. The mortgage was to her total detriment and certainly did not improve her family's lot. Yet it was assumed by the law of Louisiana that the husband would be better able to serve the marital community because of his superior commercial skills and that the wife would benefit from his absolute power over the property of the marriage.

> Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. . . *Kirchberg v. Feenstra,* 609 F.2d 727, 733 n.14 (5th Cir. 1979).

Article 2404 represents the clinging to "baggage of sexual stereotypes", *Orr v. Orr,* 440 U.S. 268, 283 (1979) which this Court has sought to curtail.

Statutory schemes which are based on sexual stereotypes or on presumptions of superior male abilities without substantial beneficial purpose have been consistently denied constitutional protection by this Court. See *Frontiero v. Richardson,* 411 U.S. 677 (1973) (where female armed service member had to prove she provided more than one-half of her husband's support for husband to receive the same benefits that wife of male armed service member automatically received based on presumption that women were supported by their husbands); *Taylor v. Louisiana,* 419

U.S. 522 (1975) (where women were exempted from jury duty because of their "presumed role in the home"); *Stanton v. Stanton,* 421 U.S. 7 (1975) (where the sex-based age of majority was based on overboard or "loose-fitting" generalizations about males); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), *Califano v. Goldfarb,* 430 U.S. 199 (1977) and *Califano v. Webster,* 430 U.S. 313 (1977) (where presumptions about males as wage earners and females as their dependents denigrated a woman's earnings under the Social Security Act); *Califano v. Westcott,* 443 U.S. 76 (1979) (where the granting of welfare benefits to families with unemployed fathers, but not to families with unemployed mothers based on assumption that fathers are breadwinners while mothers stay at home).

Where a gender classification is found to exist, it must then be applied to the following test: the classification must serve an important government interest and must be substantially related to achieving that interest. As the Fifth Circuit Court of Appeals has stated, the district court gave little guidance for determining the important government interest to be served by the head and master scheme. The Court, therefore, looked to the State's brief from which only one sentence shed light on the important governmental objective to be served: "One of the two spouses has to be designated as the manager of the community," which the Court interpreted as meaning that the State has a valid interest in providing for management of the community property, *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979). If this was the legislative purpose to be served by Article 2404, the State and Mr. Kirchberg failed to show how a gender-neutral means of community management would not serve this state objective. In fact, effective January 1, 1980, the head and master statutes have been repealed and a

gender-neutral method of community management adopted, which suggested to the lower court that it would not be possible for the State to show that Article 2404 is substantially related to the stated legislative interest, *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979).

While a governmental body has the right to provide for the orderly management of property of a marriage, the assertion of this right will not immunize its laws if they infringe on the Constitutional rights of its citizens. Such was the basis of this Court's decision in *Trimble v. Gordon,* 430 U.S. 762 (1977) when the constitutionality of an Illinois law prevented the disposition of interstate property to illegitimates was at issue. While any state has the power to control the orderly disposition of property at death, this power will not shield a statute from the Constitution and allow an invidious discrimination to stand, *id.* at 773. The State of Louisiana in the lower court and appellant Kirchberg have made much of the right of Louisiana to regulate property rights between husband and wife as expressed in *Labine v. Vincent,* 401 U.S. 532 (1971), but *Trimble v. Gordon,* 430 U.S. 762 (1977) has seriously eroded that holding:

> . . . we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine.* To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls. *Trimble v. Gordon,* 430 U.S. at 776 n.17.

Where a state statute in the area of marital property rights works to discriminate against any of its citizens it is subject to constitutional scrutiny and its subject matter will not shield it from such scrutiny. Any claim that equal protection scrutiny should not be applied to property regulation in the family context has been laid to rest in *Orr v. Orr,* 440 U.S. 268 (1979), where this Court held that a discriminatory

Alabama alimony statute must fall when the constitutional rights of Alabama's citizens have been violated.

Other possible state objectives for Article 2404 have also failed to withstand judicial scrutiny. One propounded by Alabama in an effort to justify a state statute that awarded alimony to women only in *Orr v. Orr,* 440 U.S. 268 (1979) was that the alimony statutes validly reflected ". . . the State's preference for an allocation of family responsibilities under which the wife plays a dependent role. . ." *Id.* at 281. This statutory purpose has consistently been declared invalid since it is based on old stereotypes and generalizations that the woman stays home and rears the family while the man earns a wage and deals in the world of ideas, *Orr v. Orr,* 440 U.S. at 280; *Craig v. Boren,* 429 U.S. 190, 198 (1976); *Stanton v. Stanton,* 421 U.S. 7, 10 (1975).

Clearly, the facts in this case would invalidate any claim that the legislative design of the statute in question is to benefit the wife as compensation for a long history of discrimination in marriage. Article 2404 is part of the long history of discrimination against married women so the reasoning of *Kahn v. Shevin,* 416 U.S. 351 (1974), *Schlesinger v. Ballard,* 419 U.S. 498 (1975), and *Califano v. Webster,* 430 U.S. 313 (1977) (per curiam), does not apply to Mrs. Feenstra's situation. In each of those cases the statute or regulation benefitted some women and did not put any women at a disadvantage. The laws were upheld because of their legislative objective of compensating certain women for past discrimination.

Moreover, the rationale of promoting "family life" is unavailable here. The head and master system has worked to destroy the Feenstra household. Even if the Feenstra marriage would have failed regardless, the mortgage signed by Mr. Feenstra was made on the family home and both his wife and daughter could find themselves homeless if the mortgage is enforced.

Nor could the state assert that Article 2404 was designed to help needy spouses. While legislation designed to help a needy spouse which uses "sex as a proxy for need" is a legitimate and important state interest, gender-based classifications which are "gratuitous" and without which the needy spouse would not be harmed cannot survive equal protection scrutiny. As in *Orr v. Orr, supra,* at 281-283, a gender-neutral classification would better serve any legitimate State objective than the heavily male favored statute that has injured Mrs. Feenstra.

> Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to rebound. . . to the benefit of those without need for special solicitude. *Id.* at 283.

Any legislative purpose proposed to legitimatize the head and master scheme in Louisiana would necessarily fall under equal protection scrutiny because the legislative objective would not be "substantially related" to achieving that objective. This is additionally born out by the Louisiana Legislature's repeal of the head and master system and its provisions for a gender-neutral system of community management as of January 1, 1980.[3]

In sum, Louisiana Civil Code Article 2404 cannot survive this Court's standard of review applied in sex discrimination cases. The statutes gender-classify and any possible state objective to be achieved by a head and master scheme can be better served by a gender-neutral classification. Mr.

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[3]See La. Civ. Cod. Ann. Arts. 2325-2376, particularly Art. 2346 (West Cum. Pamphlet 1980).

Feenstra had absolute managerial power over the property belonging to both he and his wife which was an arbitrary sex-based preference. All of the State's protective interests toward women and the tradition of Spanish and French civil law cannot save this discriminatory classification. Fortunately, for Louisiana women, with the exception of Mrs. Feenstra, the unconstitutional classifications have now been repealed.

Although the gender based classification of the Louisiana head and master scheme clearly falls within the intermediate level of equal protection scrutiny as discussed above, this Court has not scrutinized a statute which is as invidious as Article 2404.[4] For this reason, appellee Feenstra maintains that sex should be declared a suspect criterion. The case at bar, seeking a declaration that Louisiana Civil Code Article 2404 is unconstitutional under the equal protection clause of the Fourteenth Amendment, is as strong a fact situation and as obvious a denial of equal protection as a Virginia statute forbidding marriage between blacks and whites. (See *Loving v. Virginia,* 388 U.S. 1 (1967). "Distinctions between

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[4]As recently as 1973 the Louisiana Supreme Court spelled out the nature of a wife's ownership in the community:

> Civil Code Article 2404 establishes that, other than for the exceptional case, the husband administers all the things in the community as head and master of the community *as if they were his own separate property*. . . as if they were his own, whether in fact they are or not. . .Since the wife is given options at the dissolution of the marriage in regard to claiming or renouncing her one-half interest in the community of acquets and gains, it cannot be said that she has an interest in the community which is equivalent to perfect ownership. *Creech v. Capitol Mack, Inc.,* 287 So. 497, 507-508 (S. Ct. La. 1973).

This obvious denigration of a woman's role in her community and within her own family is without match in the laws challenged in the sex discrimination cases of the last decade.

citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943). Distinctions between citizens solely because of their sex are as inherently unequal and should be subject to the closest judicial scrutiny.

B. Louisana cannot avoid constitutional scrutiny by special clauses which allow a wife to contract out of the unconstitutional head and master scheme or to avoid an injurious mortgage on the family home.

Equal protection scrutiny cannot be avoided by the claim that Mrs. Feenstra and any other married woman in Louisiana who does not contract out of the head and master system have made a free choice as was maintained by the State of Louisiana and the district court below, *Kirchberg v. Feenstra,* 430 F. Supp. 648 (E.D. La. 1977). As the Fifth Circuit Court of Appeals has so carefully pointed out, when the choice of who manages and controls matrimonial property is made by the State, and not the individual spouses, the State is required to provide equal protection of the law, *Kirchberg v. Feenstra,* 609 F.2d 727, 733 (1979). Further, appellant Kirchberg distinguishes the major sex discrimination cases and bases his entire equal protection argument on the fact that because Mrs. Feenstra could have filed a declaration by authentic act under Article 2334 limiting her husband's power to alienate their family home without her consent, she has been the architect of her own predicament.

This Court has rejected the concept that an insurmountable barrier is necessary before a statute can be considered a denial of equal protection since *Reed v. Reed,*

404 U.S. 71 (1971). In that case, the offending discriminatory statute could have been avoided if the decedent left a will naming an executor. Similarly, the possibility of the decedent writing a will in *Trimble v. Gordon,* 430 U.S. 762 (1977), presented the absence of an insurmountable barrier to avoid equal protection analysis. Yet, this Court firmly disallowed the insurmountable barrier test to survive in that case. "...[T]he focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly. . . Hard questions cannot be avoided by a hypothetical reshuffling of the facts." *Id.* at 773-74.

In a strong denial of a sex-based classification, this Court in *Frontiero v. Richardson,* 411 U.S. 677 (1973), struck down a statute which did not completely deny fringe benefits to female military personnel but gave females the additional burden of proving that their husbands receive over one-half their support from their wives. Therefore, Lt. Sharron Frontiero theoretically did not have an insurmountable barrier to receiving these fringe benefits. This is a burden nonetheless, and this Court refused to tolerate such burdens under the Constitution. Further, this Court struck down Louisiana statutes which automatically exempted women from jury service unless they filed a declaration of their desire to serve, *Taylor v. Louisiana,* 419 U.S. 522 (1975). When all the burdens are on the female to try to balance the scales in her favor, it cannot be maintained that the statutes establish equal classes of citizens.

The fact that Mrs. Feenstra, at some time prior to the mortgage at issue, could avoid the threat to her home, either by eliminating the head and master system through a marriage contract or by filing a declaration to prevent the mortgage without her consent, has no constitutional significance. Both spouses must sign a marriage contract and

this must be agreed to prior to the marriage. The right to contract out of the head and master scheme does not compensate for the husband's automatic power if he refuses or neglects to so contract. The wife always must begin from an unequal bargaining position; she is asking her husband to give up an enormous power that is only his to give away. Further, the State puts an economic burden on couples who desire to give the wife some managerial control over her future property in legal and filing fees which is not placed on couples who allow the State to choose the management scheme. The scheme established by statute clearly reflects disproportionate rights given to the male at marriage, and these are rights not easily taken away. Surely, the supposed right to contract out of the head and master system reflects the inequality of the spouses, rather than the freedom of choice.

It is inaccurate to determine that a couple's failure to contract out of the head and master scheme means that they freely chose the head and master scheme. This presumed intent in Louisiana parallels the "statutory will" theory in *Trimble, supra,* where Illinois claimed that the failure of an illegitimate's father to write a will means that the father chose the State to dispose of his property at death without benefit to his illegitimate child. As this Court said in *Trimble,* "[w]ith respect to any individual, the argument of knowledge and approval of the State law is sheer fiction." 430 U.S. 762, 775, n.16 (1977).

Appellant Kirchberg distinguishes the facts in this case from the line of equal protection cases on the grounds that the "disadvantaged person" in *Trimble v. Gordon, supra, Reed v. Reed,* 404 U.S. 71 (1971), *Craig v. Boren,* 429 U.S. 190 (1976), and *Orr v. Orr,* 440 U.S. 268 (1979), was unable to overcome the insurmountable barrier established by State

law so his or her constitutional rights were denied. As discussed above, this Court has rejected the concept that an insurmountable barrier is necessary in order to find a legislative classification unconstitutional. It is not constitutionally significant if the "disadvantaged person" has the power to overcome a barrier or not. If there is a barrier to overcome, the state has established a classification that is subject to constitutional scrutiny.

According to appellant's argument, contracting out of head and master was unnecessary for Mrs. Feenstra; all she needed to do was file a declaration by authentic act that her consent was required before her husband could mortgage their home which would not involve an attorney's fee. However, she still has notarial and filing fees which is a financial burden placed on the wife and not the husband. Moreover, the wife may never alienate the community property by herself under any circumstances. To prevent her husband from alienating the property by himself, she must be the one to take the affirmative step and file the notarized declaration. The right of the wife to file the declaration does not compensate for the right of the husband to alienate the property by himself. The amount of the transactional costs are irrelevant. By placing all the burdens, financial included, on the female, the State cannot remedy an inherently discriminatory pattern.

C. The Louisiana Civil Code has readily survived constitutional scrutiny and the judgement holding that Article 2404 is unconstitutional has not injured the free flow of commerce in Louisiana.

All assertions that the lower court decision holding Article 2404 unconstitutional has led to a chaotic state of affairs in Louisiana commercial circles has no substance and is without basis in fact. Such statements only add confusion to the case at hand. The Louisiana Legislature has repealed Article 2404 effective January 1, 1980. The repeal was determined during the 1977 Legislative Session when the Senate resolved to adopt an equal management system over community property. The Codal provisions regulating the marriage contract and the rights of the parties in relation to community property have been completely revised.[5] Therefore, all persons doing business in the State of Louisiana, especially lawyers, were put on notice for two and one half years that the head and master system of control over community property would be coming to an end. On December 12, 1979, the Fifth Circuit Court of Appeals held that Article 2404 was unconstitutional and eliminated that codal article from the laws of Louisiana, *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979).

The offensive laws have been repealed since January 1, 1980 and there was simply no confusion or uncertainty after the lower court decision. The Louisiana Attorney General represented the State of Louisiana at the Fifth Circuit appeal, and yet has declined joining the apppeal to this Court. In fact, because of the new equal management codal provisions, the Attorney General's Office asserts the appeal

[5]See La. Civil Code Ann. Articles 2325-2376 (West Cum. Pamphlet 1980).

should be dismissed and considers the State of Louisiana an appellee. If there was any confusion over the lower court decision or if any problems had occurred in the free flow of commerce in the State, the Attorney General could have joined in the appeal seeking a reversal of the Fifth Circuit decision. The concern of appellant Kirchberg for the survival of the Civil Code is unnecessary, because the State has cured any inequities by its new codal provisions dealing with rights over marital property, and the remainder of the Civil Code is intact. If the State of Louisiana deems its Civil Code secure and its citizens protected, there is no need for Mr. Kirchberg to defend the Code single handedly.

Mr. Kirchberg has essentially two concerns over the affect of the lower court decision: (1) which spouse will have the power of alienation over community immovable property from December 12, 1979 and (2) whether the wife will be able to renounce her interest in the community after December 12, 1979. Neither concern, however, represents any problematic situation. The first concern was resolved in January 1, 1977 when Article 2334 was amended to limit the husband's power to alienate immovable community property whether the title is in the names of both spouses or in the name of the husband alone, La. Civ.Code Ann. Art. 2334 (West Supp. 1979). Therefore, both the husband and wife must sign a lease, mortgage or act of sale of community immovables and have been doing so at least since 1977.

The second problem offered by Mr. Kirchberg is based on the affect the lower court decision has on Article 2410 which gives the wife the power to renounce the community as a means of exonerating herself from the debts of the marriage. While any link between Article 2404 and 2410 is dubious, Article 2410 also has been repealed as of January 1, 1980 (West Cum. Pamphlet 1980). It is not within the Court's

purview to determine how Article 2410 will survive the finding that Article 2404 is unconstitutional, but in all practicality no real dilemma exists. The renunciation must be done by notarial act within thirty days after the husband's death or when a Louisiana court has adjudicated the existence of the community debt.[6] Therefore, any wife who would know of her right to renounce the community was also aware that the right of renunciation would be repealed as of January 1, 1980, and knew for several months. The forthcoming repeal of head and master laws controlled all such possible questions. The December 12, 1979 ruling that Article 2404 is unconstitutional has had no bearing on the functioning of other marital property laws.

D. The head and master scheme works to deprive a wife of her property without due process of law in violation of the Fourteenth Amendment.

The lower court decision, *Kirchberg v. Feenstra,* 609 F.2d, 727 (5th Cir. 1979), determined that Article 2404 was unconstitutional because it was a denial of equal protection under the Fourteenth Amendment. The district court found that it is the alleged denial of due process which affects the equal protection claim; "in practical terms these are merely opposite sides of the same issue," *Kirchberg v. Feenstra,* 430 F. Supp. 642, 644,n.2 (E.D.La. 1977). In the alternative to these approaches to the constitutionality of Article 2404, appellee Feenstra also maintains that she has been deprived of her property without due process when the law assumes she has waived her right to notice before her property is alienated or encumbered.

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[6]La. Civ. Code Ann. Art. 2410 (West 1971).

As discussed above, the automatic appointment of the husband as manager of the community results from the operation of state law and not the free choice of the parties or private contract. Mrs. Feenstra was deprived of a significant property interest without procedural due process when her husband, clothed with powers granted him by state law, mortgaged her interest in the family home without any notice to her, and without her knowledge or consent. Her interest in the community home was thereby seized to satisfy a debt of which she was completely ignorant.

The essential meaning of due process is the protection of the right to a notice and hearing, *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). The encumbrance of appellee Feenstra's interest in the family home with no notice to her and the resulting seizure by executory process was possible only by operation of state law, which designated the husband a head and master of the community property. It bears noting that Mrs. Feenstra was notified of the seizure of her home only fortuitously. Article 735 of the Louisiana Code of Civil Procedure designated the husband as the proper defendant in any action asserting a right against the community; therefore, only the husband is statutorily entitled to notice that a lawsuit is pending against the community.

Because Mrs. Feenstra's interest in the community was mortgaged without notice or an opportunity for her to defend that interest prior to its seizure by her husband's alleged creditor, her property has been exposed to liability and seized with no commensurate procedural protection. She has been placed in this unfortunate position by operation of state law, which gives full powers of management of community property to the husband. State law thereby presumes that she has waived her procedural due process right to be notified before her property is alienated or encumbered.

Certainly, due process rights are subject to waiver and can be waived, *Boddie v. Connecticut,* 401 U.S. 371 (1971); *National Equipment Rental Ltd. v. Szukhent,* 375 U.S. 311 (1964). However, the jurisprudence is clear that waiver of constitutional rights should not be inferred lightly, and that courts should indulge every reasonable assumption against waiver, *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Ohio Bell Telephone Co. v. Public Utilities Comm'n.,* 301 U.S. 292 (1937); *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389 (1937).

Indeed, the Supreme Court has stated that a waiver of due process rights is effective only when knowingly, intelligently, and voluntarily made. *D. H. Overmeyer Co. v. Frick Co.,* 405 U.S. 174 (1972); *Swarb v. Lennox,* 405 U.S. 191 (1972). In *Swarb v. Lennox, supra,* a confession of judgment purporting to waive notice and hearing prior to judgment was held unconstitutional and ineffective, even though it was contained in a written contract signed by the debtors. Because of the circumstances surrounding execution of the waiver; i.e., the waiver was part of a contract of adhesion, signed by consumers with no bargaining power to alter the contract and the parties did not understand the significance of the cognovit clause they signed, the waiver could not be enforced legally. The implied waiver of notice is even more indefensible in this case, as it does not appear in writing, and operates automatically, upon marriage by operation of state law, not by private contract entered into by the parties.

Under these circumnstances, Mrs. Feenstra cannot be held to have knowingly, intelligently, and voluntarily waived the due process right to notice and hearing prior to the encumbrance and subsequent seizure of her interest in community property. This makes the statutory designation

of the husband as head and master of the community, and the waiver of the wife's procedural due process rights of notice and hearing which it creates, constitutionally insupportable.

II.

THE LOWER COURT DECISION THAT THE HEAD AND MASTER STATUTE IS UNCONSTITUTIONAL SHOULD BE APPLIED PROSPECTIVELY: BUT THE HOLDING ALSO APPLIES TO THE PARTIES IN THE INSTANT CASE.

The issue of whether a finding that the Louisiana head and master statute was unconstitutional should be applied prospectively was first raised by the State of Louisiana in its brief before the Fifth Circuit Court of Appeals. (Appellee's Brief to the 5th Cir., Pt. IV). The State's brief was adopted by Karl Kirchberg but he neve raised the issue of prospective application until his Petition for Jurisdiction and his appeal before this Court. Although prospective application of a ruling is not usually a part of a decision where a state action is first held unconstitutional, but rather becomes an issue in second generation cases, Mrs. Feenstra agreed to a prospective ruling in her case because she wished to avoid widespread commercial hardship or inequity. A serious inequity has been imposed on Mrs. Feenstra, however, and it was never her intention to relinquish her right to benefit from a favorable decision. Nor is there anything in the record or the lower court decision to indicate that the State or the Fifth Circuit intended Mrs. Feenstra to be excluded from the victory after she had been waging the battle for four years.

Throughout the State's discussion of a prospective ap-

plication of an unconstitutional holding in its brief before the lower court, prospective application is equated with a holding of nonretroactivity. Indeed, this Court has often used the terms "prospective" and "nonretroactive" interchangeably. See *Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940); *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). The fifth Circuit Court of Appeals has followed this Court's lead: "[w]e apply our decision today prospectively only, because a holding of retroactive invalidity of Article 2404 would create a substantial hardship. . .", *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979). Of course, the date the lower court's holding of unconstitutionality goes into effect is not October 22, 1974, the date of the mortgage at issue, but December 12, 1979, the date of the decision itself. The only question, with respect to the holding, is whether the finding that Article 2404 is unconstitutional applies to Mrs. Feenstra and her particular injurious situation. Mrs. Feenstra contends she has been included.

As far as the issue of inclusion of Mrs. Feenstra in an invalidation of Article 2404, the State of Louisiana and counsel for appellee, Feenstra have always been in agreement. As was stated by the State in their brief for Appellees in the United States Court of Appeals for the Fifth Circuit,

> If this court should grant Mrs. Feenstra the relief sought and if this court would give such a decision prospective application, the only Louisiana woman affected would be Mrs. Feenstra. (Appellees, Edwin W. Edwards and the State of Louisiana, Brief to the United States Court of Appeals for the Fifth Circuit, at 27.)

Mr. Kirchberg, as a fellow appellee, before the Fifth Circuit, joined the State's brief and at no time in the lower court asserted that a holding of unconstitutionality should not be

applied to the parties before the court.

In the Petition for Jurisdiction and throughout appellant's Original Brief, it is clear that Mr. Kirchberg is not asking this Court to determine whether a holding of the unconstitutionaliity of Article 2404 should be applied prospectively or should be applied to nullify the mortgage on Mrs. Feenstra's home. Rather, Mr. Kirchberg is asking that this Court translate what the Fifth Circuit Court of Appeals meant by its prospective ruling. Clarification of the Fifth Circuit's meaning as to its opinion, however, may be accomplished by other means than a Supreme Court ruling. The State of Louisiana agrees, and in its Motion to Dismiss the State asserts that the Fifth Circuit ". . . has continuing power to accept and pass upon a petition to clarify an outstanding mandate, to declare what it meant by its' mandate, and to change the mandate." (Citations omitted) (at 8).

If this Court decides to reach the issue of whether Mrs. Feenstra should be allowed to reap the benefit of a favorable constitutional decision, current case law points in Mrs. Feenstra's favor. The requirement that Mrs. Feenstra benefit from the prospective overruling is "an avoidable consequence of the necessity that constitutional adjudications not stand as mere dictum," *Stoval v. Denno,* 388 U.S. 293, 301 (1967). Article III of the Constitution compels Federal Courts only to resolve actual and concrete cases and controversies and not address hypothetical questions. Article II courts

> . . . may not decide non-cases which are not adversary situations and in which nothing of immediate consequences to the parties turns on the results, *Marbury v. Madison,* Cranch 137 (1803).

Article III forecloses a federal court from applying a new rule to conduct which occurs only subsequent to its an-

nouncement. "The announcement of the new rule. . . means that it becomes intimately bound up with the decision of a case and controversy. In a literal sense, it is *decisive* of a case and controversy", Perspective Overruling and Retroactive Application in the Federal Courts, 71 *Yale L.J.,* 907, 933 (1962). Thereby, a federal court holding that Article 2404 is unconstitutional, but not applicable to Mrs. Feenstra and the mortgage held on her home would be an advisory opinion only.

As was pointed out by Paul J. Mishkin in The Supreme Court, 1964 Term, 79 *Harvard L.R.,* 56, 60-61 (1965), there is a practical problem with constitutional adjudications made prospective only. If the new ruling does not include the parties litigant and parties anticipate such a limiting ruling, there will be no stimulus to initiate a suit seeking a change in the law. Such a lack of stimulus would result in federal courts not having the opportunity to rule on many unsound or outmoded legal doctrines.

The Fifth Circuit devoted much of its opinion to the decree that an actual case and controversy was presented by the parties, *Kirchberg v. Feenstra,* 609 F.2d 727, 731 (1979). It is inconceivable, therefore, that the lower court took the extraordinary course of not applying its decision to the parties herein. Article III considerations and the pronouncements of this Court require that the individual who sought judicial review of a constitutional question, be accorded the benefit if the decision is in her favor. (See *U.S. v. Dunbar,* 470 F.Supp. 704, 708 (D. Conn. 1979), aff'd. 610 F.2d 807 (2d Cir. 1979).)

In civil cases, reviewing lower federal court holdings which dealt with constitutional issues, this Court has made prospective only rulings which included the parties litigant. In *Cipriano v. City of Houma,* 395 U.S. 701 (1969), for

example, this Court reviewed a Louisiana election law in light of the equal protection clause of the Fourteenth Amendment, reviewed the decision of an Article III court, and found the state law unconstitutional and made its decision prospective only. The plaintiff who initiated the suit to have the statute declared unconstitutional was not denied the particular relief sought. In the remand order, Mr. Cipriano was awarded all costs he incurred in bringing the lawsuit and, more importantly, the election he sought to prevent was nullified and local officials were prevented from issuing bonds pursuant to that election. (See Appellee's Appendix A)

Also in *Corpus Christi Parish Credit Union v. Martin,* 358 So.2d 295 (S.Ct.La. 1978), *cert. denied,* 439 U.S. 897 (1978), which is distinguishable from the case at bar, and in which the majority did not deal with the constitutional issue, the dissenting opinion discussed in detail their preference for a nonretroactive holding that Article 2404 and 2334 were a denial of equal protection. This Court might consider the recommendations of this dissent opinion because it is the only opinion where a Louisiana Court has grappled with the difficulties of declaring the Louisiana head and master system unconstitutional with its attendant impact on mortgages already operating within the State. While the dissent would have held the judicial invalidation of the statute to be applied prospectively only ". . . in the case before the court, the declaration of invalidity should be applied, lest the judicial declaration be considered merely as dicta." *Corpus Christi Parish Credit Union, supra,* at 303 (Tate, J. dissent).

Thus, there is no precedent for an Article III court to deny the benefit of a constitutional ruling to the party litigant even if the ruling is applied prospectively only. Given the

expressed desires of the briefing parties to the Fifth Circuit and given the lower court's expressed opinion that an actual case and controversy existed in Mr. Kirchberg's attempts to enforce his mortgage, it is clear that the decision that the Louisiana head and master scheme is unconstitutional is applicable to Mrs. Feenstra and the mortgage on her home.

CONCLUSION

The head and master statute of Louisiana provides a clearly discriminatory gender-based classification when a gender-neutral classification provides for the efficient and equitable management over marital property. There is no legitimate state interest that could be presented which would justify the patently offensive concept of male as the head and master over the community, or which would be substantially relaxed to the sex-based classification. The burdens and injury placed upon appellee Feenstra with the pending loss of her home, have worked to deny Mrs. Feenstra's right to equal protection of the law.

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals should be affirmed with a clarifying statement that the holding of the unconstitutionality of Article 2404 applies to the parties before this Court. The mortgage held by appellant Kirchberg on Mrs. Feenstra's home, which is the subject of this lawsuit, should be declared null and void.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JOSEPH Q. CIPRIANO	*	CIVIL ACTION
VERSUS	*	NO. 67-1853
CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLIAN	* * * *	SECTION C

****

JUDGMENT

The plaintiff, Joseph Q. Cipriano, having appealed to the United States Supreme Court from Judgment entered in this cause on the 23rd day of July, 1968, wherein the United States Supreme Court ordered, adjudged and decreed that such Judgment be reversed with costs assessed at $1,903.84 in favor of Jopseh Q. Cipriano, plaintiff.

Now in accordance with the Judgment of the United States Supreme Court, dated the 16th day of June, 1969,

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment of this Court entered the 23rd day of July, 1968, be, and the same is hereby vacated and set aside; and it is further

ORDERED, ADJUDGED AND DECREED that all

provisions of the Constitution and statutes of the State of Louisiana which have the effect of requiring ownership of property and payment of taxes thereon as a condition of voting in utility revenue bond selections in said State, be, and they are hereby decreed to be in violation of the Constitution of the United States of America and, therefore, null, void and without effect; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, the City of Houma, G. Leslie Broussard, Mayor, Christian L. Olivier, Charles Davidson, Peter Bourgeois, Jr., Samuel Lusco and Wilbert P. Bonvillain, their successors, agents, servants, employees and all other persons in active concert with them, be and they are hereby permanently restrained and enjoined from enforcing, executing, administering, or in any manner giving effect to the provisions of the Constitution and statutes of the State of Louisiana which have the effect of requiring the ownership of property and payment of taxes thereon as a condition of voting in utility revenue bond elections in the State of Louisiana; and it is further

ORDERED, ADJUDGED AND DECREED that the said defendants, their successors, agents, servants, employees and all other persons in active concert with them, be and they are hereby permanently restrained and enjoined from issuing any bonds pursuant to the utility revenue bond election held in the City of Houma on October 24, 1967, which said election is decreed to be null, void and without effect; and it is further

ORDERED, ADJUDGED AND DECREED that Judgment be and is hereby entered that Joseph Q. Cipriano recover from the City of Houma, G. Leslie Broussard, Mayor, Christian L. Olivier, Charles Davidson, Peter Bourgeois, Jr., Samuel Lusco and Wilbert P. Bonvillain, or

their successors in office, the sum of One Thousand Nine Hundred Three and 84/100 ($1,903.84) Dollars as costs on appeal, and that he have execution therefor.

New Orleans, Louisiana, October 14th, 1969.

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

/s/ Illegible

UNITED STATES DISTRICT JUDGE

/s/ Illegible

UNITED STATES DISTRICT JUDGE

MOTION FILED
NOV 4 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1388

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and STATE OF LOUISIANA.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, INSTITUTE FOR WOMEN TODAY, NATIONAL CENTER ON WOMEN AND FAMILY LAW, NATIONAL COALITION OF AMERICAN NUNS, UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LEGAL DEFENSE FUND.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1388

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and STATE OF LOUISIANA.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The NOW Legal Defense and Education Fund, American Civil Liberties Union Women's Rights Project, American Jewish Committee, American Jewish Congress, Institute for Women Today, National Center on Women & Family Law, National Coalition of American Nuns, Unitarian Universalist Women's Federation, Women's Equity Action League, and the Women's Legal Defense Fund respectfully move, pursuant to Rule 36.3 of this Court's Rules, to file the within brief *amici curiae* in *Kirchberg* v. *Feenstra.* Counsel for Appellant Karl Kirchberg and Appellee Joan Feenstra have consented to the filing of this brief and their letters of consent have been filed with the Clerk. The State

of Louisiana, defendant below, has failed to respond to repeated requests for its consent.

The above named *amici* organizations share the conviction that women and men should be accorded equal treatment under the law. Gender discrimination constitutes a formidable barrier to the full participation of individuals in our society and these organizations are dedicated to the eradication of that barrier.

Louisiana's head and master law at issue here, which gives husbands exclusive and unrestricted power to manage the assets of the marital community, is one of the most egregious examples of the way in which laws based on outdated and unjust sexual stereotypes harm women and perpetuate inequality. As the facts in this case illustrate, the consequences of such a law are tragic, not only for Appellee here, who is threatened with the loss of her family home, but for all women. The message of the statute is clear: a state may treat women as second class citizens, conclusively presume them incapable of exercising management powers and deny them equal rights, even as to property which they own.

Amici respectfully submit that this brief will serve to illuminate the issue before the Court by placing it in a broader context than the parties, whose appropriate focus is the particular application of the head and master law that gave rise to this litigation. Such context is relevant for consideration of one of the principle constitutional guarantees—that of equal protection. The brief delineates the gender line that pervades the male management system; details the pernicious impact that sex role stereotyping has on all women; contrasts Louisiana's head and master law with the management schemes employed by other community property and common law states; and offers additional information from the legislative history of Louisiana's recent repeal of Article 2404 and its com-

panion provisions. *Amici* believe that this information will assist the Court in resolving the issues raised by this case.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, INSTITUTE FOR WOMEN TODAY, NATIONAL CENTER ON WOMEN AND FAMILY LAW, NATIONAL COALITION OF AMERICAN NUNS, UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LEGAL DEFENSE FUND.

Interest of *Amici*

The interest of *amici* appears from the foregoing motion.

Statement of the Case

At issue in this case is whether Louisiana's designation of the husband as sole "head and master" of the community property acquired by both the husband and wife during their marriage can withstand constitutional scrutiny.[1] This codal provision confers upon the husband, while denying the wife, the exclusive power to administer, dispose of, alienate or encumber the marital property, without the consent or permission of his wife. As applied in this instance, Article 2404 allowed a husband, charged by his wife with a "crime against nature," to give his attorney in that criminal proceeding a mortgage on the couple's family home as security for the payment of his legal fees. Threatened by the lawyer with seizure and judicial sale of her home, the wife has sought to remedy the egregious injustice suffered as a result of the application of the gender based classification drawn by the Louisiana law.

In October, 1974, Joan Feenstra, Appellee, learned that her husband, Harold Feenstra, had molested their nine year old daughter. Mrs. Feenstra asked her husband to leave their home and, when he refused, filed criminal charges against him in an effort to protect her child.

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[1] Article 2404 of the Louisiana Civil Code, as challenged herein, provides in pertinent part:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

La. Civ. Code Ann. art. 2404 (West 1971).

Article 2404 was repealed after the institution of this litigation and replaced by Act 709, effective January 1, 1980, which provides for management of community property on a gender neutral basis. Act of July 20, 1979, Act 709, 1979 La. Sess. Law Serv. (West 1979) (repealing 1976 La. Acts, No. 627). As used herein, "Article 2404" will refer to the statute as it existed prior to the passage of Act 709.

Harold Feenstra was arrested on or about October 12, 1974. While in prison, he retained attorney Karl J. Kirchberg, Appellant herein, to represent him.

Five days after his arrest, Harold Feenstra allegedly signed a promissory note to Kirchberg in the amount of $3,000 as a retainer f. r the legal services Kirchberg was to render.[2] The note, Kirchberg contends, provided for interest at 8% per year and attorney's fees amounting to 30% of the obligation, if the note were not paid when due.[3] It appears that Feenstra paid Kirchberg approximately $800 the day following his signing of the note.

Shortly after Feenstra's execution of the promissory note, Kirchberg apparently demanded security for the instrument, insisting that Feenstra execute a mortgage in favor of Kirchberg on the Feenstra family home. On October 22, 1974, Feenstra executed an "Act of Mortgage," subsequently recorded, which was drafted by and for the benefit of Kirchberg and notarized by Kirchberg's

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[2] The record is not clear as to the nature of the services actually performed by Kirchberg for Harold Feenstra. Kirchberg contends that it was as a result of his efforts that Feenstra was not prosecuted. Belying such assertions, however, is the statement of Mrs. Feenstra, who maintains that she dropped the charges against her husband soon after his arrest, when she felt assured that her husband no longer posed a threat to her child.

Moreover, whether the retainer agreement was applicable solely for the defense of the criminal proceedings or whether other legal services would be provided in the future for Mr. Feenstra, until the reasonable value of those services reached $3,000, is likewise not apparent from the existing record. It appears that Kirchberg's law firm performed further services for Mr. Feenstra in connection with separation proceedings against Joan Feenstra. *See* discussion *infra* at 7.

[3] The promissory note was not made part of the record below; accordingly, when and whether the time for payment became due under the note is unclear. Kirchberg contends that the note became due on October 18, 1974, the day after it presumably was executed.

law partner. This Act of Mortgage stated that Feenstra's obligation was $3,000, despite the fact that Feenstra had satisfied almost one-third of the alleged debt on the day immediately prior thereto.[4]

After his release from jail, Harold Feenstra did not return to the home in which he had resided with his wife. Rather, he left Louisiana and the marriage, having expressed his intention to give his interest in the marital home to his wife, and having instructed attorney Kirchberg to draw the documents necessary to effect such a transfer. Harold Feenstra, represented by Kirchberg's partner, C. Howard McCaleb, III, commenced a marital separation proceeding, and a separation from bed and board was granted on June 10, 1975. However, neither Kirchberg nor his law partner McCaleb ever effectuated the transfer of the Feenstra marital home to Joan Feenstra, as Harold Feenstra had instructed.

Feenstra, as Kirchberg concedes, made payments, totalling $225, in partial satisfaction of the obligation under the promissory note,[5] on the date the separation action was filed and on the date a judgment granting separation was awarded.

The Feenstra home to which Kirchberg claims title was described by Kirchberg, in order to assist the U.S. Marshal

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[4] In the petition for mortgage foreclosure, Kirchberg sought only $2,015.28 principal, thus presumably crediting Feenstra with payments of $984.72, approximately $800 paid by Feenstra while incarcerated, and approximately $225 paid some eight months later, in all likelihood in connection with the separation proceedings, discussed *infra* at 7.

[5] It is noteworthy that in the two instances in which Kirchberg represented Harold Feenstra—defending the criminal molestation charges filed by Mrs. Feenstra and obtaining the marital separation—Harold and Joan Feenstra were in a clearly adversary relationship. Nevertheless, the absurd effect of the operation of the Louisiana codal provision at issue is that Joan Feenstra is exposed to liability for the costs of defending her husband in the very proceedings in which she opposed him.

in effecting service on Joan Feenstra, as a "green rundown camp across from a volunteer fire truck." It had been purchased by Joan and Harold Feenstra in both their names and with both their funds (he from wages and she from the sale of fish) in 1966, almost eight years prior to the events which led to the Act of Mortgage.

Joan Feenstra not only did not consent to, but also was given no notice whatever of, the encumbrance on the marital home, which she owned jointly and equally with her husband under the Louisiana laws governing property. Indeed, Mrs. Feenstra had no knowledge of any codal provision which permitted her husband to jeopardize her interest in her property without her knowledge or consent. Her first formal notice of Kirchberg's claim to her family home was in February 1976, more than a year after Harold Feenstra's incarceration, when she was served with a summons commencing the action for a mortgage foreclosure in the Civil District Court of Orleans.

Kirchberg filed a second action in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment that he had not violated the Truth-In-Lending Act, 15 U.S.C. § 1635(a), in connection with the mortgage. Mrs. Feenstra counterclaimed against Appellant Kirchberg, the State of Louisiana and the Governor, urging, *inter alia,* that the male management provision of Louisiana's Civil Code was unconstitutional on equal protection and due process grounds.

In April 1977, the district court granted the motion of the State of Louisiana for summary judgment on Mrs. Feenstra's counterclaim. The court concluded that the Civil Code provision did not violate the equal protection and due process clauses of the Constitution on the theory that the parties had the opportunity to select their own community property regime. *Kirchberg* v. *Feenstra,* 430 F. Supp. 642 (E.D. La. 1977), *rev'd,* 609 F.2d 727 (5th Cir. 1979).

The Fifth Circuit unanimously reversed, in an opinion issued December 12, 1979. The Court held prospectively that Article 2404 of the Louisiana Civil Code was unconstitutional under the fourteenth amendment. *Kirchberg* v. *Feenstra,* 609 F.2d 727 (5th Cir. 1979).

The Louisiana head and master law was repealed by the Louisiana Legislature before the Fifth Circuit declared it constitutionally invalid. The Legislature enacted a gender neutral rule for management of community property, to replace male management. This change became effective January 1, 1980, only twenty days after the Fifth Circuit issued its ruling.

The issue to be decided by this Court, therefore, does not affect the future of—or threaten chaos to—the Louisiana community property regime. It does, however, have great significance to the parties before the Court; to women whose property was alienated or encumbered pursuant to the male management provisions during the brief period before Louisiana's new law went into effect; and to all women who have been denigrated by the Louisiana decree that knighted their husband as "head and master" and branded them as incompetent and unworthy.

Summary of Argument

I.

Article 2404 of the Louisiana Civil Code, in effect at the time the mortgage on Joan and Harold Feenstra's home was executed, grants a husband exclusive and unrestricted managerial control over the married couple's community property. This head and master law distinguishes between similarly situated husbands and wives solely on the basis of their sex. Despite the wife's contribution to the marital community—as wage earner or homemaker—and her indisputable ownership interest in the community property, the law deprives her of the right to manage and control her property.

The Louisiana community property regime provides two procedures whereby male management can be modified. First, if a prospective husband agrees to relinquish his preferred status, the couple can execute an antenupital contract specifying a different form of management in whole or in part. Second, in the absence of such contract, a wife can file a declaration by authentic act under Article 2334, through which she can gain a veto power over her husband's alienation of specified immovable property titled in the couple's joint names.

Contrary to Appellant Kirchberg's assertions, the availability of these alternatives does not transform male management into a voluntary arrangement between husband and wife. Rather, this gender biased law is imposed on the marriage by the State, thereby invidiously discriminating against women. The fact that the head and master law is not in all respects an insurmountable barrier for Louisiana wives cannot save it from constitutional scrutiny.

The gender classification at issue here is based on archaic and overbroad sexual stereotypes about the respective capabilities of, and proper roles for, women and men. These stereotypes teach that the wife is dependent, inexperienced and incompetent, while the husband is the head of the family and, by virtue of biology and experience, skilled in business matters. Such assumptions do not comport with economic or social reality, or with the principles underlying joint ownership of marital property. This Court has held repeatedly that laws based on sexual stereotypes about the capabilities of women or the allocation of family roles are incompatible with the equal protection principle.

II.

To be deemed constitutional, a gender classification must bear a close and substantial relationship to an important governmental objective. *Craig* v. *Boren*, 429 U.S. 190, 197

(1976). The burden is on the proponents of the statute to make the showing required by this standard. The State of Louisiana and Appellant Kirchberg have totally failed to carry this burden.

In the proceedings below, the State of Louisiana offered only one sentence to describe the governmental interest underlying Article 2404: "One of the two spouses has to be designated as the manager of the community." *Kirchberg* v. *Feenstra,* 609 F.2d at 735. The similarity between Louisiana's legislative choice of the husband as the managing spouse and the statutory scheme held invalid in *Reed* v. *Reed,* 404 U.S. 71 (1971), leads ineluctably to the conclusion that the State interest here is not sufficiently important to pass constitutional muster.

Moreover, no substantial relationship has been, or can be, established between the gender classification in Article 2404 and any governmental interest. To the contrary, the State's repeal of the head and master law and enactment of an equal management provision effective January 1, 1980, demonstrates that management of marital property can be assured consonant with the equal protection principle. The fact that all other community property states, consistent with the trend in common law states, have eradicated by statute the vestiges of male management from their marital property laws, signals a nationwide consensus that sex based classification is not the least discriminatory or most efficient method of allocating management power. Failing to satisfy either part of the *Craig* standard, the Louisiana head and master law is constitutionally invalid and must fall.

ARGUMENT

I.

LOUISIANA'S DESIGNATION OF THE HUSBAND AS "HEAD AND MASTER" OF THE MARITAL COMMUNITY, WITH EXCLUSIVE POWER TO ADMINISTER AND ALIENATE THE MARITAL PROPERTY, IS ROOTED IN ARCHAIC AND OVERBROAD SEXUAL STEREOTYPES AND CONSTITUTES INVIDIOUS GENDER BASED DISCRIMINATION AGAINST THE WIFE.

A. Article 2404 Draws An Invidious Gender Line Between Similarly Situated Husbands And Wives.

The Louisiana Code classification at the heart of this case, Article 2404, grants a husband, while denying a wife, exclusive and complete managerial control over the couple's community property.[6] Once married or residing in Louisiana, under this Article, the wife has no power to administer, encumber or sell any of the community property without her husband's consent, even if title is held solely or jointly by her. The husband in Louisiana, in contrast, is designated by the State as the "head and master" with complete and unlimited authority over the marital property.

This codal provision exonerates the husband from any responsibility to give notice to or obtain permission from his wife before encumbering or disposing of their property, except where the wife holds exclusive title to the property. Thus, regardless of the wife's contribution to the marital community—as a wage-earner or as a homemaker—this head and master law imposes upon her all of the obligations of ownership, while, at the same time, depriving her of one of the most significant incidents of ownership—management.

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[6] *See* n. 1 *supra.*

The gender line drawn by the Louisiana head and master law decisively distinguishes between similarly situated husbands and wives. The allocation of management control by the State to the husband bears no relationship to the actual ownership of the community property. Nor, as discussed below, does it relate to managerial competence or contribution to the assets or the community. *See infra* at 19-23. Under Louisiana law, all property acquired during the marriage by either spouse, except that which is received by gift or inheritance, belongs to the community, owned one-half by the husband and one-half by the wife; yet the law grants only the husband the sole right to manage the marital property. *See T. L. James & Co.* v. *Montgomery,* 332 So.2d 834 (La. 1976); M. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions,* 19 Baylor L. Rev. 20, 53 (1967) [hereinafter cited as Vaughn, *Policy of Community Property*]. Thus, while Mr. and Mrs. Feenstra each owned one-half of their family home, the Louisiana law in effect during their marriage allowed Mr. Feenstra to mortgage it without Mrs. Feenstra's knowledge or consent to secure payment of his legal fees in actions in which he and Mrs. Feenstra were adversaries.

As the Fifth Circuit noted, several alternatives existed to the management system selected by Louisiana. "The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife acting jointly, or by either the husband or wife acting concurrently." *Kirchberg* v. *Feenstra,* 609 F.2d at 733. In choosing management by the husband alone, Article 2404 calls for different treatment of similarly situated married persons, where the only basis for that different treatment is whether the person is female or male. *Reed* v. *Reed,* 404 U.S. at 75.

B. The Availability Of Procedures To Limit Male Management Does Not Mitigate The Gender Classification Drawn By The State Or Remove "Head And Master" From Constitutional Scrutiny.

The wife could remove herself from this onerous regime only if her prospective husband agreed to relinquish his rights as "head and master" *before* the marriage and enter an antenuptial contract.[7] Once married, the relief available to the wife is limited. She could protect her interest in the community property only by taking formal steps, pursuant to Article 2334,[8] to declare that her consent must be obtained prior to any encumbrance or sale of specified property by her spouse. Such so-called "opt-out" alternatives do not rescue the head and master law from constitutional infirmity, as Appellant Kirchberg contends.

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[7] La. Civ. Code Ann. art. 2325 (West 1971) (repealed by Act of July 20, 1979, Act 709, 1979 Sess. Law Serv. (West 1979)).

[8] Article 2334 of the Louisiana Civil Code, in effect at the time of the mortgage herein, provided in relevant part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

This provision was amended in 1976, effective January 1, 1977, to require, *inter alia*, the wife's written authority or consent before alienation of immovable property titled in the names of both the husband and the wife. La. Civ. Code Ann. art. 2334 (West Supp. 1979). Thus, the mortgage held by attorney Kirchberg on Mrs. Feenstra's home could not have been validly executed after January 1, 1977 without her consent. Section 2334 was repealed by Act 709, effective January 1, 1980. As used herein, "Article 2334" will refer to the statute as it existed at the time the mortgage on Mrs. Feenstra's home was executed.

Indeed, they perpetuate the very same discriminatory classification between similarly situated husbands and wives, by placing burdens on the wife that her husband is not required to bear, and denying her management rights equal to those conferred upon him by the State.

The antenuptial contract clearly does not give the Louisiana wife any unilateral power to overcome the male management barrier erected by the State. Instead, it leaves her totally dependent on her prospective husband's willingness to relinquish the preferred position he is accorded by operation of law. Moreover, it works a severe hardship on the woman who is unfamiliar with Louisiana law, for only a contract executed before the wedding ceremony would be valid and enforceable,[9] and once the couple exchanged marriage vows, any antenuptial agreement between them could not be "changed or altered after marriage, even by formal agreement." *Hanley* v. *Drumm*, 31 La. Ann. 106, 111 (1879). In the absence of such a contract prior to the marriage ceremony, husband management automatically governed.[10] As the Fifth Circuit correctly

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[9] La. Civ. Code Ann. art. 2329 (West 1971) (repealed by Act of July 20, 1979, Act 709, 1979 Sess. Law Serv. (West 1979)).

[10] The district court below erred in concluding that since Mrs. Feenstra "failed to protect her home by elimination or modification of the community regime through a marriage contract," *Kirchberg* v. *Feenstra*, 430 F. Supp. at 648, the head and master provisions became part of a tacit contract she and Mr. Feenstra entered upon signing the marriage license. *Id.*

Since an antenuptial agreement requires the consent of both prospective husband and wife, it defies logic to characterize the absence of a formal antenuptial contract, modifying the presumption of male control, as Mrs. Feenstra's "failure." Moreover, the tacit contract theory is unsound logically, historically and theoretically, and should not be the fiction through which the discriminatory head and master law is saved from constitutional scrutiny. *See* Amicus Curiae Brief for the Appellant at 9, *Kirchberg* v. *Feenstra*, 609 F.2d 727 (5th Cir. 1979). The Fifth Circuit correctly rejected this argument. *Kirchberg* v. *Feenstra*, 609 F.2d at 733, n. 14.

observed below, the choice presented by the State between male management and an antenuptial contract

> is hardly an even-handed one. . . . The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

Kirchberg v. *Feenstra,* 609 F.2d at 733, n. 14.

The Article 2334 declaration alternative available to the Louisiana wife after marriage is the *only* method by which she could, on her own, partially protect her equal share of community property from overreaching by her husband. Unlike the antenuptial contract, this alternative to husband management can be invoked at any time during the marriage and does not require the husband's agreement to relinquish his preferred position. However, the declaration can be made only with respect to specified immovable property held in the names of both spouses. It is enforceable only if formally executed by "authentic act"—that is, in the presence of a notary public and two witnesses—and filed for each particular property with the local Register of Conveyances and Recorder of Mortgages. Moreover, the declaration cannot confer any authority upon the wife to manage or alienate any part of the jointly owned marital property; it merely gives her a veto power to prohibit her husband from doing so without her consent.

Despite the fact that the relief available through these "opt-out" procedures is both inadequate and unfairly burdensome, Appellant Kirchberg argues that Mrs. Feenstra is the "architect of her own predicament" since she could have overcome the head and master barrier established by the State. *See* Appellant's Brief at 14-18. However, neither the possibility that the Feenstras could

have executed an antenuptial contract, nor the availability to Joan Feenstra of an Article 2334 "veto power" declaration, can transform the head and master system into a voluntary arrangement. There is absolutely no evidence that Joan Feenstra knowingly and willingly placed her property under her husband's sole management and control.

Moreover, the mere fact that a Louisiana wife might overcome male management in whole or in part does not mitigate the law's invidious gender bias or remove it from constitutional review. As this Court has recognized in other situations, the "absence of an insurmountable barrier" will not save an unconstitutional law. *Trimble* v. *Gordon,* 430 U.S. 762, 774 (1977). This same analysis should be applied with full force to the Louisiana statutory scheme.

Thus, where a statutory classification, like the one at issue here, operates only if individuals have not acted on their own, it is not thereby immune from constitutional review because the barriers it erects are not absolute. In *Reed* v. *Reed,* for example, the statutory preference for males over similarly situated females as estate administrators became relevant only if the decedent failed to name his or her administrator. 404 U.S. at 72-73. *See also Trimble* v. *Gordon,* 430 U.S. at 762 (out of wedlock children precluded from inheritance by statute only where their fathers failed to provide for inheritance by will). So too, Louisiana's male management law operates only where the marriage is not governed by a valid antenuptial contract, which the disadvantaged wife has no power to compel. In each of these situations, the law impermissibly discriminates; its barrier to equal treatment is imposed by the State.

Nor is a constitutionally invalid law saved by the fact that the barrier, once imposed, can in some cases be overcome. Thus, for example, the absence of an absolute bar-

rier precluding *all* widowers from receiving death benefits for their wives' work-related accidents, did not cure the constitutional infirmity in Missouri's worker's compensation law. *Wengler* v. *Druggists Mutual Insurance Co.*, 100 S. Ct. 1540 (1980). In *Wengler*, a widower who could prove actual dependency on his deceased wife's wages, or establish his mental or physical incapacity, was entitled to the same benefits as a widow, whose dependency was presumed. *Id.* at 1541. The lack of an absolute bar denying benefits to *all widowers* did not diminish the gender bias inherent in the Missouri law. *See also Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). *Cf. Carey* v. *Population Services International*, 431 U.S. 678 (1977) (constitutional rights of prospective purchasers of contraceptives violated by regulation limiting—but not absolutely barring—access to contraceptives).

Moreover, a constitutionally invalid law is not cured because those who are disadvantaged by the discriminatory classification are able to voluntarily withdraw from disfavored status. Thus, a law allowing resident aliens to remove themselves from disfavored status by affirming an intent to apply for citizenship did not survive this Court's scrutiny in *Nyguist* v. *Mauclet*, 432 U.S. 1 (1977). As the Court stated clearly in *Nyquist*, "[t]he fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9.

Here too, the Louisiana head and master law cannot be saved from constitutional infirmity by the fact that in some respects its gender classification does not erect an absolute bar. The Louisiana Supreme Court's holding to the contrary in *Corpus Christi Parish Credit Union* v. *Martin*, 358 So.2d 295 (La.), *cert. denied*, 439 U.S. 897 (1978), was wrongly decided and should not be followed. *Id.* at 299 (Tate, Calogero, Dennis, JJ., dissenting). The Louisiana male management statutory scheme inescapably discriminates against women.

C. The Louisiana Husband Management Scheme Is Freighted With The Baggage Of Sexual Stereotypes Incompatible With The Equal Protection Principle.

The determination by Louisiana to allocate the management of marital property to husbands, while precluding wives from such activity, is based on archaic and overbroad sexual stereotypes about the capabilities of men and women and the roles they are to play in society. *See* Vaughn, *Policy of Community Property, supra,* at 35-36. The husband, the stereotype dictates, is the competent marital partner, more practiced, experienced, and biologically capable of making judgments about business matters. *Id.* at 45. The wife, in contrast, is presumed inadequate and untrustworthy to function in economic spheres. She is deemed to be dependent upon the managerial skills of "the husband as the head of the family [and] . . . due to economic and biological factors . . . the member of the marital partnership more practiced and experienced in the acquisition and management of property." W.Q. de Funiak & M. Vaughn, *Principles of Community Property* 276 (2d ed. 1971) [hereinafter cited as de Funiak & Vaughn, *Principles of Community Property*].

The Louisiana scheme fosters and perpetuates the image of women as untutored and incapable of executing managerial decisions. The message of the Louisiana Legislature is inescapable: women inherently lack the ability to make reasonable decisions or function adequately in a business world; only men possess the requisite skills. Denigrating women, the Louisiana law decrees that the wife's contribution—as wage-earner or homemaker—belongs to the community, but that control over the administration or disposition of the property of that community belongs to the husband. Regardless of her demonstrated abilities as a manager in the home or in the business community, the wife is simply branded unworthy. Such a statutory scheme reflects an "attitude of 'romantic pater-

nalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero* v. *Richardson,* 411 U.S. at 684. The economic consequences for wives without protection from their husband's presumed managerial skills can be severe. *See, e.g., United States* v. *Mitchell,* 403 U.S. 190 (1971); *Bagur* v. *Commissioner of Internal Revenue,* 603 F.2d 491 (5th Cir. 1979); *Corpus Christi Parish Credit Union* v. *Martin,* 358 So.2d at 296.

The presumption that the female is "destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas" cannot justify Louisiana's gender classification. *Stanton* v. *Stanton,* 421 U.S. 7, 14-15 (1975). *See Orr* v. *Orr,* 440 U.S. 268, 283 (1979); *Craig* v. *Boren,* 429 U.S. at 202, n. 14. Nor can a legislative distinction be sustained by the assumption that "all or most male spouses are better administrators or possess non-substantiated particular attributes . . . [or] that all or most female spouses are housewives less fitted by occupation or interests than males to perform general economic functions." *Corpus Christi Parish Credit Union* v. *Martin,* 358 So.2d at 302; *see Reed* v. *Reed,* 404 U.S. at 76. The Louisiana head and master law impermissibly pigeonholes women and men solely on the basis of their sex and reinforces "the role-typing society has long imposed." *Stanton* v. *Stanton,* 421 U.S. at 15.

Legislative classifications rooted in such archaic and overbroad generalizations about the dependency of wives on their husbands, *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 643 (1975), or the allocation of family responsibilities, *Orr* v. *Orr,* 440 U.S. at 279, are incompatible with the equal protection principle. This Court has rejected such sexual stereotypes as the basis for gender classifications even where statistical support could be found to validate the stereotype for some. *See Craig* v. *Boren,* 429 U.S. at 200-04; *Weinberger* v. *Wiesenfeld,* 420 U.S. at 643; *Frontiero* v. *Richardson,* 411 U.S. at 681-82.

Here, the assumptions underlying the Louisiana head and master law are not related to economic or social realities, however different these realities may have been when male management was first enacted.[11] In over half of all marriages today the husband is not the sole breadwinner, responsible alone for generating marital property.[12] U.S. Dep't of Labor, *New Data Relate Workers' Earnings to the Families in Which They Live,* BLS News (March 27, 1980). Moreover, even where the wife is not in the paid labor force, her contribution to the marital community has gained increasing recognition. *See, e.g., DiFlorido* v. *DiFlorido,* 331 A.2d 174, 179, n. 15 (Pa. 1975); *Parsons* v. *Parsons,* 229 N.W.2d 629, 634-35 (Wis. 1975); D. Freed & H. Foster, *Divorce in the Fifty States: An Overview as of August 1, 1979,* 5 Fam. L. Rep. (BNA) 4027, 4031 (September 11, 1979); J. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri,* 41 Mo. L. Rev. 165, 168 (1976) [hereinafter cited as Krauskopf, *A Theory for "Just" Division*].

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[11] The notion of the husband as "head and master" of the marital community had its roots in the Middle Ages. *See Creech* v. *Capitol Mack, Inc.,* 287 So.2d 497 (La. 1973). It became part of the Louisiana Civil Code in 1825. K. Spaht, *Background of Marital Regimes Revision,* 39 La. L. Rev. 323 (1978-1979) [hereinafter cited as Spaht, *Background of Marital Regimes*]. One commentator suggests that husband management was perhaps in recognition of the fact that most husbands alone contributed monetary assets to the community fund. H. Daggett, *Is Joint Control of Community Property Possible?* 10 Tul. L. Rev. 589, 596-97 (1936). With only 5.6% of all wives gainfully employed in 1900, H. Hayghe, *Families and The Rise of Working Wives—An Overview,* 99 Monthly Labor Rev. 12 (May 1976), this may have at one time more closely reflected the labor force reality. *Amici* submit, however, that it never comported with economic reality because it never reflected the significant value that wives who are homemakers contribute to the marital partnership.

[12] In 1977, wage-earning wives contributed approximately 25% of their families' income; approximately 12% contributed 50% or more. H. Hayghe, *Working Wives' Contribution to Family Income in 1977,* 102 Monthly Labor Rev. 64 (October 1979).

Indeed, in Louisiana and seven other community property states, the joint ownership of community property is premised on the principle that each spouse contributes equally to the marriage, and therefore, that each should benefit from the material fruits of the union.[13] *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 592 (1979) (Stewart, J., dissenting); R. Bartke, *Marital Sharing—Why Not Do It By Contract?* 67 Geo. L. J. 1131, 1134-35 (1979). Husband and wife, the system teaches, are equal partners. *Hisquierdo* v. *Hisquierdo,* 439 U.S. at 592; de Funiak & Vaughn, *Principles of Community Property, supra,* at 5; W. Reppy & W.O. de Funiak, *Community Property in the United States* 13 (1975). The spouses are deemed to have contributed equally to the acquisition of the property, regardless of the actual division of labor in the marriage and regardless of whether one spouse formally "earned" it. M. Planiol, *Treatise on Civil Law,* vol. 3, Part I, No. 934 (11th ed. 1938). "The underlying and undergirding drive of community is that each spouse is equal to the other. . . . Any provision denying equality is anti-community." Vaughn, *Policy of Community Property, supra,* at 34.

Thus, even if it is justifiable to mandate management by the marital partner who is more capable or has contributed more to the marital property, the inflexible as-

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[13] Although "the traditional view in common law states, is that ownership depends on title," *Hisquierdo* v. *Hisquierdo,* 439 U.S. at 578, common law states also are increasingly incorporating elements of marital partnership principles in their marriage and divorce laws. *Id.* at 578, n. 11; *See, e.g.,* Mich. Comp. Laws Ann. § 557.71 (West Supp. 1980) and Mass. Gen. Laws Ann. ch. 209, § 1 (West Supp. 1980) (as amended by St.1971, c. 423, § 14, St. 1979, c. 727) (eliminating common law presumption that husbands control property held by marital partners as tenants by the entireties); Conn. Gen. Stat. Ann. § 46b-81 (West 1979) (providing for equitable distribution of property, however titled, at time of divorce); Wis. Stat. Ann. § 767-255 (West Supp. 1980) (presumption that non-inherited property, however titled, be divided equally upon divorce); Krauskopf, *A Theory for "Just" Division, supra,* at 167-73.

sumption that this person is the husband does not comport with reality. As the Louisiana Legislature recognized in replacing "head and master" with equal management by husband and wife,[14] sex is not an accurate proxy for managerial competence, contribution or ownership. *Cf. Craig* v. *Boren,* 429 U.S. at 198. The Legislature stated clearly that implementation of equal management is called for because "wives in Louisiana are capable today of managing property," and "the present equality of ownership during marriage . . . should be matched with equality of access to use of community property during marriage." La. S. Con. Res. 54, Reg. Sess. (1977).

The Louisiana head and master law challenged herein perpetuates a view of women as second class citizens dependent upon the managerial skills of their husbands and "carries with it the baggage of sexual stereotypes." *Orr* v. *Orr,* 440 U.S. at 283. As this Court has recognized consistently in its decisions over the past decade, such gender based role typing is constitutionally impermissible.

II.

LOUISIANA'S GENDER BASED HEAD AND MASTER LAW LACKS THE REQUISITE SUBSTANTIAL RELATIONSHIP TO AN IMPORTANT GOVERNMENTAL OBJECTIVE.

A. The Standard For Review Of Gender Based Classifications Was Articulated In *Craig* v. *Boren.*

This Court has explicitly recognized that gender based classifications, "not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256, 273 (1979). For this

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[14] With the repeal of male management, effective January 1, 1980, Louisiana joined the seven other community property states in making management and control of the marital property gender neutral. *See infra* at 28.

reason, gender classifications must "serve important governmental objectives and must be substantially related to achievement of those objectives" in order to be deemed constitutional. *Craig* v. *Boren,* 429 U.S. at 197. Governmental objectives found to be merely legitimate rather than important do not satisfy this standard. *Reed* v. *Reed,* 404 U.S. at 76.

This careful scrutiny has been applied consistently by this Court to every fourteenth amendment sex discrimination claim it has considered since *Craig. See, e.g., Wengler* v. *Druggists Mutual Insurance Co.,* 100 S. Ct. at 1545; *Orr* v. *Orr,* 440 U.S. at 279; *Califano* v. *Westcott,* 443 U.S. 76, 89 (1978), *aff'd,* 443 U.S. 901 (1979); *Califano* v. *Goldfarb,* 430 U.S. at 210-11. The standard is rigorous. Since 1971, the opinions of this Court have upheld only those few gender classifications found to compensate women for past discrimination. *Califano* v. *Webster,* 430 U.S. 313 (1977); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974). No such claim has been or could be made for the statute at issue here.

The practical effect of the *Craig* test, correctly applied by the Fifth Circuit below, is to make gender classifications *prima facie* unconstitutional: "[t]he burden . . . is on those defending the discrimination to make out the claimed justification . . ." *Wengler* v. *Druggists Mutual Insurance Co.,* 100 S. Ct. at 1546. The proponents of the head and master statute have totally failed to carry this burden. No important state interest has been articulated either by Appellant or by the State of Louisiana. At the same time, no showing whatsoever has been made that there is the requisite substantial relationship between the state's interest and the invidious gender classification employed in the statute which gives husbands unilateral and unrestricted managerial power over the community property.

B. The Governmental Objective To Be Achieved By Article 2404 Has Not Been Articulated By The State.

In the proceedings below Louisiana supported its legislative scheme with one justification, which the Fifth Circuit found completely inadequate:

> The State . . . has given us only *one sentence* on the state objective to be achieved in article 2404: One of the two spouses has to be designated as the manager of the community."

Kirchberg v. *Feenstra,* 609 F.2d at 735 (emphasis in original).

No further elaboration by the State is to be found either in this record or in the legislative history of the provision.[15] Appellant Kirchberg's brief offers no further guidance on this issue. This Court has cautioned that it will consider only those actually articulated state interests which are "legitimate and non-illusory," and will not speculate as to governmental objectives. *McGinnis* v. *Royster,* 410 U.S. 263, 276-77 (1973); *see also, Schlesinger* v. *Ballard,* 419 U.S. at 520. It can only be concluded that Louisiana has come forward with no important governmental objective because, in fact, none exists.

The Fifth Circuit speculated that the State's single sentence may have constituted its assertion of a governmental interest in providing for the way in which marital property is to be managed. *Kirchberg* v. *Feenstra,* 609 F.2d at 735. The very fact, however, that the court had to indulge in such reasoning conclusively demonstrates that

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[15] The State not only failed to articulate the objective served by the gender classification in the proceedings below, but also has sought dismissal of this appeal from the Fifth Circuit's decision that the head and master law is unconstitutional. Certainly if the state could have overcome the Fifth Circuit's objections to its statutory scheme raised by the court below, or believed there was any value in defending the male management regime, it would have done so.

the State has failed to carry its burden of articulating the governmental interest advanced by the challenged gender based classification.[16]

Moreover, the similarity of the statutory scheme at issue here to the one challenged in *Reed* v. *Reed* suggests that Louisiana would not be able to identify a sufficiently important governmental interest to be served by its gender classification. In *Reed,* the State of Idaho, unlike Louisiana here, articulated two governmental objectives to be served by its gender based preference for similarly situated males as estate administrators. This Court found one objective, the avoidance of intrafamily controversy, to be irrelevant and the other, reduction of the probate court's workload, to amount to nothing more than a desire for administrative efficiency. *Reed* v. *Reed,* 410 U.S. at 75. In *Reed,* as here, the challenged statute regulated the administration of property, after probate and during marriage, respectively. Louisiana's statement in this suit that "[o]ne . . . has to be designated manager" suggests a state interest no more important than, and not different from, the claim of administrative efficiency already found insufficient in *Reed.*

C. The Gender Based Classification In Article 2404 Is Not Substantially Related To An Important Governmental Interest.

The application of the second prong of the *Craig* test reveals most sharply why Louisiana's head and master

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[16] Speculation can also provide a number of other possibly relevant government interests, all of which have been previously rejected by this Court as not sufficiently important to justify the use of a gender based classification. *See, e.g., Orr* v. *Orr,* 440 U.S. at 269 (state's preference for an allocation of family responsibilities under which the wife plays a dependent role not sufficiently important to justify sex based statute); *Frontiero* v. *Richardson,* 411 U.S. at 690 (administrative convenience not an important state interest); *Reed* v. *Reed,* 404 U.S. at 76-77 (goals of avoidance of intrafamily controversy and reducing court workload not important enough to sustain gender classification).

law must fall. Even if we assume that the designation of a single manager for the community property is an important governmental interest, Louisiana has utterly failed to demonstrate why that manager must unquestioningly and inevitably be the husband.

The "substantial relationship" analysis applicable here encompasses two related inquiries: whether the gender classification is "carefully tailored" so that it advances the important governmental interest without carrying with it the "baggage of sexual stereotypes," *Orr* v. *Orr,* 440 U.S. at 283, and whether the classification employed is the least discriminatory method available to the State to achieve its objective. *Craig* v. *Boren,* 429 U.S. at 211. Because of the severe and pervasive nature of sex discrimination, this Court has stated that a gender classification should not be upheld without "an exceedingly persuasive justification." *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. at 273.

The classification employed in Article 2404 does not promote any important governmental objective. The use of sex as a proxy for managerial competence or contribution to the assets of the community makes the classification simultaneously overbroad, because it gives all husbands power of management whether or not they are actually competent to manage or have contributed to the community, and underinclusive, because it excludes all women from management regardless of their competency or contribution. *Cf. Craig* v. *Boren,* 429 U.S. at 199. As discussed in Point I, above, this gender classification, which remained unchanged for more than a century and a half, is squarely based on stereotypical notions about the respective roles and abilities of women and men. Such outdated ideas cannot supply an adequate justification for a gender based statute. *Stanton* v. *Stanton,* 421 U.S. at 14.

At the same time, it is clear that Article 2404 does not represent the least discriminatory method of furthering

the governmental objective. Here again, Louisiana has failed to come forward with the showing required to support its legislative choice. As the Fifth Circuit recognized, the State would be hard pressed to do so in light of its recent repeal of Article 2404. *Kirchberg* v. *Feenstra*, 609 F.2d at 735. Louisiana's enactment of an equal management statute and its concomitant recognition both that women are competent to manage and that persons who have equal ownership rights are entitled to equal management powers,[17] eliminates any pretense that the statute is closely related to an important governmental interest. Having adopted a gender neutral provision, it is awkward if not impossible for the State to argue that male management better achieved the state objective.[18]

The legislative reform effected by Louisiana was consistent with actions already taken by the seven other community property states. All of these states have abandoned male management for some form of equal management[19], showing that there is a consensus for the idea that sex based classification is neither the least discriminatory nor the most efficient or accurate method of allocating managerial power in the community. Similarly, common law property jurisdictions have largely eradicated

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[17] *See* S. Con. Res. 54, Reg. Sess. 1977, discussed *supra* at 23.

[18] While there is of course a difference between what a state does voluntarily and what it is constitutionally compelled to do, it appears that in this situation the two coincided. Louisiana's revision of Article 2404 was prompted in large measure by this Court's decision in *Reed*. Spaht, *Background of Marital Regimes*, *supra*, at 324.

[19] Ariz. Rev. Stat. Ann. § 25-214 (West 1976); Cal. Civ. Code § 5125 (West Supp. 1979-1980); Idaho Code § 32-912 (Supp. 1977); Nev. Rev. Stat. § 123.230 (1967); N.M. Stat. Ann 40-3-14 (Michie 1978); Tex. Fam. Code Ann. tit. 1, § 5.22 (Vernon 1975); Wash Rev. Code Ann. § 26.16.030 (West Supp. 1979-1980).

by statute the vestiges of male management from their marital property laws in favor of equitable management.[20]

Thus, the gender classification in Article 2404 does not satisfy either component of the "substantial relationship" inquiry: it is not carefully tailored to avoid sexual stereotypes and it does not represent the least discriminatory means for achieving any important governmental objective. The inescapable conclusion is that Louisiana's head and master law violates the equal protection clause.

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[20] In common law property jurisdictions, each spouse generally controls the property held in his or her name. However, property held by husband and wife as tenants by the entirety, while supposedly owned by the marital unit as a single entity, was not subject to equal control by the married couple. At common law, entireties property was under the exclusive control of the husband. He had the sole privilege of occupancy and was entitled to all of the income from the property. He could alienate these property rights without his wife's consent and his creditors could levy against them. J. Johnston, *Sex and Property*, 47 N.Y.U. L. Rev. 1033, 1085 (1972).

After the passage of the Married Women's Property Acts in the latter part of the nineteenth century, guaranteeing to women the management and control of their separate property, a majority of jurisdictions abolished male management of entireties property. *Id.* at 1085-86. The courts in Michigan, Massachusetts and North Carolina, however, construed their states' acts as having no impact on these tenancies. O. Phipps, *Tenancy by Entireties*, 25 Temp. L. Q. 24, 32 (1951-1952). In 1975 and 1979 respectively, Michigan and Massachusetts enacted statutes which provide for equal management of all property held as tenants by the entireties. Mich. Comp. Law Ann. § 557.51 (West Supp. 1980); Mass. Gen. Laws Ann. ch. 209 § 1 (West Supp. 1980) (as amended by St.1979, c. 727 (1979)). Today, North Carolina is the only state to still use this sex based scheme of control. *See Rauchfuss v. Rauchfuss*, 33 N.C. App. 108 (Ct.App. 1977).

Conclusion

For the reasons set forth above, *amici* respectfully submit that the decision of the Fifth Circuit declaring Article 2404 unconstitutional should be affirmed.

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